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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

ARKLA, INC.,
PETITIONER
v.
JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can the State of Arkansas impose its unapportioned sales tax directly upon the value an article which is consumed while it remains in the flow of interstate commerce and which has never come to rest within the State of Arkansas without violation of the Commerce Clause of the Constitution of the United States?

2. Can the State of Arkansas impose its sales tax upon a purchase of natural gas that is completed out-of-state, where the natural gas is consumed while it is still in the flow of interstate commerce and never comes to rest within the State of Arkansas, without violation of the Commerce Clause of the Constitution of the United States?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Arkla, Inc. is a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Little Rock, Arkansas and Shreveport, Louisiana. This corporation has only wholly owned subsidiaries. Arkla, Inc. is a publicly traded corporation listed on the New York Stock Exchange.

Respondent James C. Pledger is the duly appointed and currently serving Director of the Arkansas Department of Finance and Administration. He is the person who is charged by statute with administering the state and local Compensating (Use) Taxes and Gross Receipts (Sales) Taxes imposed in Arkansas.

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ARKLA, INC.,
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v.

JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Arkla, Inc. respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Arkansas entered in the above-entitled proceedings on March 30, 1992.

OPINIONS

The Opinion of the Supreme Court of Arkansas (App. A, *infra*, 1a) is reported at 309 Ark. 18, 827 S.W.2d 126. The Order of the Supreme Court of Arkansas denying the petition for rehearing (App. C, *infra*, 26a) is unreported.

The Memorandum Opinion (App. B, *infra*, 13a) of Special Chancellor Jack Ruple of the Pulaski County Chancery Court entered on November 8, 1990, is unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. A, *infra*, 1a) was rendered on March 30, 1992, and a Petition for Rehearing was timely filed by the Petitioner and was denied on May 4, 1992 (App. C, *infra*, 26a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional:

Article 1, §8, Cl. 3. Powers of Congress. The Congress shall have power . . .

[3] To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;

Statutory:

The pertinent sales tax and use tax provisions of the Arkansas Code Ann. are set forth in Appendix D, *infra*, 27a.

STATEMENT OF THE CASE

Arkla, Inc. (herein "Arkla" or "the Company") is a company in the business of producing, buying, transporting and selling natural gas. It has interstate transmission and intrastate distribution facilities in the states of Kansas, Oklahoma, Arkansas, Louisiana and Texas. Practically all of the Company's activities with respect to its interstate transmission pipelines are, pursuant to the Natural Gas Act (15 U.S.C. §717, *et seq.*), subject to regulation and control by the Federal Energy Regulatory Commission (herein the "FERC").

At issue in these proceedings is the constitutionality of the imposition of a sales tax (not a use tax) by the State of Arkansas upon the value of the natural gas which is withdrawn by Arkla

directly from its interstate transmission pipelines and used and consumed within instrumentalities of interstate commerce without ever coming to rest out of the continuous flow of interstate commerce. The natural gas at issue herein is withdrawn from the interstate transmission pipeline and is consumed as compressor fuel at three compressor stations located within the State of Arkansas along such interstate transmission pipelines. These three compressor stations are known as the Beirne, Taylor and Dunn compressor stations, each of which was constructed and is operated under the authority of Certificates of Public Convenience and Necessity issued by the FERC (or its predecessor, the Federal Power Commission). These compressors are used exclusively to move natural gas through the Company's interstate transmission pipelines, as opposed to the Company's "intrastate" pipelines.

The Beirne and Taylor compressor stations are each located within the State of Arkansas on the Company's Line S which runs from Waskom, Texas through Louisiana to Perla, Arkansas, where it connects with other transmission pipelines. The Beirne and Taylor compressor stations were certificated by the Federal Power Commission in the early 1950's, and although their use was very minimal during the years at issue, when used those were primarily for the compression of natural gas for purposes of moving the natural gas in Line S either into storage in Louisiana or to effect withdrawal of such natural gas from storage in Louisiana for transmission into Arkansas.

The Dunn Compressor Station is a much larger compressor station and its fuel represents the vast majority of the compressor fuel at issue herein. It is located in the northwest corner of the State of Arkansas approximately 35 miles from the Oklahoma border on the Company's parallel lines Line 0 and Line 0-1-0 which run from Texas through Oklahoma and into Arkansas. Virtually all of the natural gas transported in Lines 0 and 0-1-0 is produced in Oklahoma, but some smaller amounts of gas transported in those lines is produced in Texas and Kansas, with a very small portion (less than 10%) being Arkansas production. However, all of the natural gas at its point of entry into the Dunn Compressor Station (whether that natural gas is produced in

Oklahoma, Texas, Kansas or Arkansas, or has been withdrawn from a natural gas storage reservoir in Oklahoma) is natural gas which, at the moment of its entry into the interstate compressors, is being transported in interstate commerce.

The Dunn Compressor Station has four separate compression units. Pursuant to Certificates of Public Convenience and Necessity, Arkla was specifically authorized by the FERC to construct and operate those four compressors and in those Certificates the FERC affirmatively found that those compressors were to be used in the transportation and sale of natural gas in interstate commerce.

All natural gas which passes through the Dunn Compressor Station necessarily proceeds from Line 0 or Line 0-1-0 through the compressor station to its discharge line. From the discharge line, the freshly compressed natural gas is processed through a series of separators and pressure regulators for ultimate dispatching, either into Line OM-1, northward toward Jane, Missouri, or into Line BT-1 and BT-1-AN to Perla, Arkansas, where those pipelines join other pipelines through which some of the natural gas is transported into other states. All of those interstate pipelines, particularly the Lines BT-1 and BT-1-AN, are operated pursuant to certification by the FERC.

During the years at issue virtually all natural gas being transported in the Company's interstate pipelines was gas purchased from out-of-state producers, although some very small quantities would have been gas produced from wells owned and operated by the Company, with some gas transported for others on a fee basis. Virtually all of the purchased gas being transported in the Company's lines S, 0 and 0-1-0 was purchased at points of production in Texas, Oklahoma, Kansas and Louisiana, although some small quantity would have been purchased in Arkansas. The regulation of all of that natural gas (including that gas purchased in Arkansas), as to its transportation, delivery and pricing, is controlled exclusively by the FERC and the Arkansas Public Service Commission (herein "APSC") has absolutely no regulatory authority over this "interstate" natural gas while it is in transit in

interstate commerce. The FERC's authority for such regulation, pursuant to the Natural Gas Act, is founded upon the Commerce Clause of the United States Constitution (*see*, 15 U.S.C. §717). The APSC's authority over such natural gas begins only after the gas has completed its interstate journey through the facilities subject to FERC jurisdiction at the point where it is metered at the various "city gates" into the Company's distribution systems.

The Arkansas Department of Finance and Administration (herein "the Department") assessed a "Sales Tax" deficiency against the Company, under the provisions of Ark. Stat. Ann. §§84-1902(d) and 1903(b),[1] based upon the total value of the natural gas consumed during the periods from January 1, 1977 through February 28, 1987 as fuel in the three above referenced interstate compressor stations. The Department asserted that, under the last sentence of Ark. Stat. Ann. §84-1902(d),[2] this use of natural gas by Arkla was the "sale" of such natural gas (presumably to itself), because such consumption (for purposes of the Arkansas Sales Tax Act) was deemed by the Department to be a "withdrawal from stock" by the Company.

The trial court held that the Commerce Clause of the United States Constitution prohibited the imposition of any such sales tax and awarded Arkla its cost of litigation, including a reasonable attorneys' fee pursuant to 42 U.S.C. §§ 1983 and 1988. The Arkansas Supreme Court reversed the trial court and held that the imposition of such sales tax did not violate the provisions of the Commerce Clause of the Constitution.

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[1] Ark. Code Ann. §26-52-103(a)(4) and 301(2) *infra*, 28a and 29a. During the period at issue (January 1, 1977 - February 28, 1987), the Arkansas Statutes Annotated were effective. However, subsequent thereto, those statutes were reenacted, substantively unchanged, as the Arkansas Code of 1987 Annotated. Thus, dual references are provided herein, but only the provisions of the Arkansas Code Annotated (now in effect) are reproduced in Appendix D, 27a, *et seq.*

[2] Ark. Code Ann. §26-52-103(a)(4), App. D, 28a.

REASONS FOR GRANTING THE WRIT

This case presents the ultimate attempt by a state to impose its sales tax in violation of the provisions of the Commerce Clause of the United States Constitution. In this proceeding, natural gas which is clearly being transported in interstate commerce (and which is generally purchased out-of-state) is consumed wholly within that stream of interstate commerce (before it ever comes to rest in Arkansas) to provide energy to drive the movement of the remaining natural gas in interstate commerce. The State of Arkansas, with the approval of its Supreme Court, has imposed a sales tax directly upon the value of the natural gas consumed within that stream of interstate commerce. This Court has never authorized nor permitted the imposition of a sales tax, or even a use tax, directly upon the value of the commodity which, at the moment of the taxable event, is being transported and moved in interstate commerce. In all such taxing schemes approved by this Court, the article which is to be subjected to the sales or use tax has become a part of the mass of the physical properties of the imposing state.

This Court held in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S.Ct. 279 (1929), that a state could not impose its use tax directly upon the value of the fuel consumed in an instrumentality of interstate commerce. This **bright-line** rule established by this Court in *Helson* has never been overruled, and the Petitioner submits it is the controlling law, under the Commerce Clause, on the issue presented. The Arkansas Supreme Court's majority opinion failed to even recognize, or discuss, the *Helson* case, even though the Petitioner fully briefed this issue, and made it the main subject of its petition for rehearing, in the court below.

There is also a direct conflict among the highest appellate courts of a number of states on this important federal issue concerning the imposition of a state excise tax directly upon articles while in the flow of interstate commerce. While the decision of the Arkansas Supreme Court below is in accord with

the very recent decisions of the Supreme Courts of Mississippi[3] and Utah,[4] it is diametrically opposed to the long-standing decisions of the Supreme Courts of Wisconsin[5] and Tennessee[6] on virtually identical facts. The Arkansas, Mississippi and Utah Supreme Courts totally ignored this Court's decision in *Helson*, while the Tennessee and Wisconsin Supreme Courts held that the bright-line rule of *Helson* was the controlling law in this factual situation.

In upholding the constitutionality of the sales tax in this case, the Arkansas Supreme Court also ignored a threshold principle of Commerce Clause jurisprudence that was announced by this Court nearly fifty years ago in the case of *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 88 L.Ed. 1304, 64 S.Ct. 1023 (1944), a sales tax case that itself arose from Arkansas. In *Dilworth*, this Court ruled that Arkansas could not impose its sales tax upon a sale which was completed in Tennessee, when the property was then brought into Arkansas and used. Petitioner submits that Arkansas cannot ignore the longstanding holding of this Court in *Dilworth* based solely upon the Arkansas Sales Tax Act's "withdrawal from stock" provision, when the gas consumed as interstate compressor fuel is gas that was purchased by Arkla in transactions completed outside of Arkansas' borders (in the vast majority of the cases) and the gas had never left the flow of interstate commerce before it was consumed as fuel in what is clearly an instrumentality of interstate commerce.

Thus, this case presents important federal constitutional issues affecting interstate commerce upon which there is a conflict

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[3] *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992).

[4] *Questar Pipeline Co. v. Utah State Tax Commission*, 817 P.2d 316 (Utah 1991).

[5] *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), *cert. denied*, 439 U.S. 997, 58 L.Ed.2d 670 (1978).

[6] *Texas Gas Transmission Corp. v. Benson*, 444 S.W.2d 137 (Tenn. 1969).

of opinion between decisions of this Court and the Arkansas Supreme Court, and between the Supreme Courts of the states. These conflicts can only be resolved by this Court. This case also presents a growing controversy between the states and the operators of interstate pipelines. This constitutional issue is obviously of extreme importance to the industry as well as the states, as reflected by the fact that three decisions of state supreme courts have been rendered within the last year regarding the taxation of such compressor fuel.[7] The constitutional issues underpinning the ultimate resolution of this case, which can only be resolved by this Court and for which this Court should grant this writ, are:

1. **Conflicting Decisions.** Are the decisions of the Supreme Courts of Wisconsin and Tennessee correct in their determination that state excise taxes, as are imposed in this case, are in violation of the Commerce Clause of the United States Constitution, or are the decisions of the Supreme Courts of Arkansas, Mississippi and Utah correct in holding that the imposition of such excise taxes do not violate the Commerce Clause? [Addressed in Section I, A., below.]

2. **Controlling Decision.** Has the decision in *Helson*, which was subsequently cited with approval by this Court in 1973 and 1981, been overruled or modified by the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed. 326, 97 S.Ct. 1076 (1977), such that *Helson* is no longer the controlling authority on this issue? [Addressed in Section I, B. below.]

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[7] Those decisions are this case, *Pledger v. Arkla, Inc.*, 827 S.W.2d 126 (decided March 30, 1992), *Tennessee Gas Pipeline Co. v. Marx*, *supra*, note 3 (decided February 5, 1992), and *Questar Pipeline Company v. Utah State Tax Commission*, *supra*, note 4 (decided August 1, 1991). Further, Petitioner is aware of similar proceedings now pending in the State of Louisiana in *Columbia Gulf Transmission Co. v. Arnold Broussard, Secretary, Department of Revenue and Taxation*, No. 336,283, Division K, 19th Judicial District Court, East Baton Rouge Parish, Louisiana.

3. **Sales vs. Use Tax.** May the State of Arkansas impose a **sales tax** (not a use tax) upon a purchase transaction which occurred in another state by deeming the consumption of compressor fuel a **sale** by Arkla (presumably to itself) at the point of consumption rather than at the point of the actual purchase? [Addressed in Section II, below.]

I.

ARKANSAS CANNOT IMPOSE ITS SALES TAX DIRECTLY UPON AN ARTICLE WHILE IN THE FLOW OF INTERSTATE COMMERCE, WHEN THAT ARTICLE IS CONSUMED WHILE STILL IN THE FLOW OF INTERSTATE COMMERCE, BEFORE IT COMES TO REST WITHIN THE STATE OF ARKANSAS; *HELSON & RANDOLPH v. KENTUCKY.*

A. Conflicts Among the Supreme Courts of the Several States.

The first judicial resolution of this particular issue, *i.e.* the attempted imposition of a use tax upon the value of natural gas consumed as interstate compressor fuel, was passed upon by the Supreme Court of Tennessee. In *Texas Gas Transmission Corp. v. Benson*, *supra*, note 6, the Tennessee Supreme Court pronounced:

> The undisputed proof is the fuel gas does not come to rest after it leaves the mains and enters the compressor engines. It is in a continuous flow and never stops moving until consumed by the engines.
>
> Thus, the fuel gas does not come to rest in this State nor does it become a part of the mass of

> property within this State. It furnishes energy to operate the compressors which maintain the constant flow of gas through this State in interstate commerce. It is, therefore, a necessary and integral part of the interstate operation.
>
> The fuel gas being one of the means by which the commerce is carried on, it is exempted from the use tax under the statute.
>
> **Moreover, we agree with the Chancellor the case of *Helson v. Commonwealth of Kentucky*, 279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929), is controlling.** (Emphasis supplied). 444 S.W.2d 137, 139.

Thereafter, in 1975, the Michigan Court of Appeals addressed this same issue in *Michigan Wisconsin Pipe Line Co. v. State*, 227 N.W.2d 334 (Mich. App., Div. 2, 1975), holding, in a final decision of the courts of that state, that:

> It would appear that the tax on the natural gas here involved is of exactly the same nature as the tax sought to be imposed in *Helson, supra*. The gas was acquired outside the State of Michigan and that portion needed for propulsion after entering this state was transported along the claimant's pipeline for that purpose. There is no apparent distinction between the gas so carried and made available as propulsion fuel and the gasoline carried in the storage tanks of a ferry boat for exactly the same purpose. In either case, the tax is upon the instrument of commerce. 227 N.W.2d 334, 336.

This Michigan court went on to cite the *Texas Gas Transmission Corp. v. Benson* decision with approval and to hold that "the withdrawal of gas to be factually inseparable from the interstate transportation itself." 227 N.W.2d 334, 337.

In 1978, the Supreme Court of Wisconsin reached a similar decision in *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, *supra*, note 5. In that case, the court largely followed *Helson*, *Texas Gas* and *Michigan Wisconsin Pipe Line Company*. However, the *Midwestern Gas* case was decided after this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). It concluded that the consumption of the compressor gas is an integral part of the process of interstate commerce and it went on to find that the consumption did not have a substantial nexus with the imposing state even under the *Complete Auto Transit* decision. The application for certiorari with respect to the decision in *Midwestern Gas* was denied by this Court.

Thus, the decision of the Supreme Court of Arkansas in these proceedings, as well as the decisions of the Supreme Courts of Mississippi and Utah, are in direct, irreconcilable conflict with the above referenced decisions of the Supreme Courts of Tennessee and Wisconsin on this important federal question involving the state taxation of interstate commerce.

B. *Helson* Remains the Controlling Authority.

Notwithstanding the prior decisions of the Tennessee and Wisconsin Supreme Courts, a final decision by the State of Michigan through one of its appellate courts, and this Court's denial of the application for a writ of certiorari in *Midwestern Gas*, the Supreme Courts of the States of Arkansas, Mississippi and Utah have concluded that the imposition of state excise taxes in this factual situation does not violate the Commerce Clause. However, Petitioner points out that none of those decisions makes any reference whatsoever to this Court's "bright-line" rule announced in its *Helson* decision.

The Arkansas Supreme Court, over the well reasoned dissent of two justices, necessarily concluded that *Helson* was inapplicable to these proceedings. The majority opinion of the Arkansas Supreme Court, like the Mississippi and Utah courts in the *Tennessee Gas* and *Questar* cases, only applied the *Complete*

Auto Transit test. Notwithstanding the fact that the Arkansas court's attention had been drawn to *Helson* in both the Petitioner's brief and petition for rehearing, the Arkansas Supreme Court never even mentioned nor addressed the *Helson* decision in its opinion below. The Supreme Courts of Wisconsin and Tennessee, and the Michigan appellate court, each concluded that the facts of those cases (as are those of the instant case) were indistinguishable from those presented in *Helson* and that this Court's "bright-line" rule in *Helson* controlled their decisions.

In *Helson*, Kentucky was attempting to impose a use tax upon the value of fuel which was purchased in Illinois to power a ferry boat engaged in interstate commerce, but where 75% of the fuel purchased in Illinois was actually consumed within the borders of the State of Kentucky. This Court held that Kentucky's attempt to tax the value of the fuel consumed to propel the ferry boat in interstate commerce was prohibited by the Commerce Clause because the fuel was as much an instrumentality of interstate commerce as the boat itself. The Court specifically held:

> [I]s not the fuel consumed in propelling the boat an instrumentality of commerce no less than the boat itself? A tax which falls directly upon the use of one of the means by which commerce is carried on directly burdens that commerce. If a tax cannot be laid by a state upon the interstate transportation of the subjects of commerce, as this court definitely has held, it is little more than repetitious to say that such a tax cannot be laid upon the use of a medium by which such transportation is effected. 279 U.S. 245, 252; 73 L.Ed. 683, 687.

The undisputed facts established in this case are even stronger for the legal proposition advocated by Arkla than were the facts in *Helson*. Here, the natural gas in question is itself the "cargo" being transported in interstate commerce, not just the fuel for the ferry boat, *i.e.* the instrumentality of interstate commerce. The sales tax which Arkansas seeks to impose in this case is not

being imposed just on the instrumentalities of interstate commerce and its fuel, but here the sales tax is imposed directly upon the value of the commodity being transported in interstate commerce itself, before such commodity ever passes through the meters at the "city gates" of the Company's distribution systems. Only after such metering, is this natural gas removed from the flow of interstate commerce, and therefore becomes a part of the mass of property within that state, subject to regulation by the APSC.

As the Supreme Court of Arkansas was specifically advised by the Petitioner's brief and petition for rehearing, *Helson* is, and continues to be, this Court's statement of the applicable Commerce Clause law with respect to this factual matter. This Court has never repudiated its decision in *Helson*. This Court has never pronounced that the **only** test to be applied in Commerce Clause cases is the four-prong test of *Complete Auto Transit*. In fact, only four years after this Court's decision in *Complete Auto Transit*, the Court clearly stated in *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981), that cases utilizing the *Helson* rationale were still applicable in certain instances. This case presents at least one of those instances.

In *Commonwealth Edison*, the Court addressed the impact of *Complete Auto Transit* on the Commerce Clause's prohibition regarding transactions that were purely local or of intrastate type activity. In that decision, which cited *Helson*, this Court clearly indicated that *Helson* was not incorrectly decided. Specifically, this Court stated:

> In this regard, the Montana court relied on this Court's decision in *Heisler v Thomas Colliery Co.*, 260 US 245, 67 L Ed 237, 43 S Ct 83 (1922), *Oliver Iron Mining Co. v Lord*, 262 US 172, 67 L Ed 929, 43 S Ct 526 (1923), and *Hope Natural Gas Co. v Hall*, 274 US 284, 71 L Ed 1049, 47 S Ct 639 (1927), which employed similar reasoning in upholding state severance taxes against Commerce Clause challenges.

* * *

> We agree that *Heisler's* reasoning has been undermined by more recent cases. The *Heisler* analysis evolved at a time when the Commerce Clause was thought to prohibit the States from imposing any direct taxes on interstate commerce. See, e.g., ***Helson & Randolph v Kentucky***, 279 US 245, 250–252, 73 L Ed 783, 49 S Ct 279 (1929); *Ozark Pipe Line Corp. v Monier*, 266 US 555, 562, 69 L Ed 439, 45 S Ct 184 (1925). Consequently, the distinction between intrastate activities and interstate commerce was crucial to protecting the States' taxing power. [Footnote omitted.]
>
> The Court has, however, long since rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attached only to a 'local' or intrastate activity.
>
> * * *
>
> We therefore hold that a state severance tax is not immunized from Commerce Clause scrutiny by a claim that the tax is imposed on goods prior to their entry into the stream of interstate commerce. Any contrary statements in *Heisler* and its progeny are disapproved. (Emphasis supplied.) 453 U.S. 609, 614–15 and 617; 69 L.Ed.2d 884, 892 and 894.

This final statement of the Court is followed by a reference to footnote 7, in which this Court expressly provided:

> **This is not to suggest, however, that *Heisler* and its progeny** [which as referenced by the Court included *Helson*] **were wrongly decided.**

(Emphasis supplied.) 453 U.S. 609, 617; 69 L.Ed.2d 884, 894, footnote 7.

In 1973, shortly before *Complete Auto Transit* was decided, this Court, in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545, 93 S.Ct. 1186 (1973), noted the continuing validity of the *Helson* rationale. In *United Air Lines* this Court stated:

> We hold that *Edelman* and *Nashville* support the conclusion of the Supreme Court of Illinois that this tax, as applied to all fuel withdrawn from storage for consumption in an interstate vehicle, does not place an unconstitutional burden on interstate commerce. Further, we decline to hold that *Edelman* has outlived its usefulness. [Footnote omitted.] We must concede that for a long time this area of state tax law has been cloudy and complicated, primarily because the varied nature of interstate activities makes line drawing difficult. This Court has established some precedents, however, and *Edelman* and *Nashville* remain useful guidelines.
>
> The line drawn between an impermissible tax on mere consumption of fuel, as in *Helson*, and a permissible tax on storage of fuel before loading, as in *Edelman* and *Nashville*, continues to serve rational purposes. **Retaining the line at this point minimizes the danger of double taxation and yet provides a source of revenue having a relation to the event taxed. Double taxation is minimized because the fuel cannot be taxed by States through which it was transported, under *Michigan–Wisconsin Pipe Line Co. v Calvert*, 347 US 157, 98 L Ed 583, 74 S Ct 396 (1954), nor by the State in which it is merely consumed, under *Helson*.** (Emphasis supplied.) 410 U.S. 623, 629–30; 35 L.Ed.2d 545, 552–53.

Again, in *Commonwealth Edison*, decided in 1981, several years after *Complete Auto Transit*, this Court reiterated that *Helson* was not wrongly decided, clearly implying that *Helson* remains the law of the land with respect to the imposition of a sales or use tax directly upon the value of the fuel consumed to power an instrumentality of interstate commerce.

The Arkansas Supreme Court totally ignored this Court's "bright-line" rule announced in *Helson* and treated that precedent as if it did not exist. For this Court to ignore this denigration of the principle of *stare decisis* by this state supreme court will leave the door completely open for all states to seek to tax all fuels consumed within the confines of interstate commerce, but within that state, to power the instrumentalities of interstate commerce. Thus, under the Arkansas Supreme Court's decision here, the value of the fuel of boats, airlines, trains, cars, buses, trucks or anything else consumed within the borders of Arkansas, but while within the confines of interstate commerce, may be directly subjected to Arkansas' sales tax, subject only to the limitations announced by this Court in *Complete Auto Transit*.

This Court's decisions have formed an evolution of the Commerce Clause restrictions on the states' powers to impose their taxes upon entities engaged in interstate commerce. However, Petitioner specifically notes that, while this Court overruled the case of *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 95 L.Ed. 573, 71 S.Ct. 508 (1951), and the holding of that case that no direct tax could be imposed upon interstate commerce or the privilege of doing business in interstate commerce, the rule of *Spector*, and the case which overruled and modified it, *Complete Auto Transit, Inc. v. Brady*, were addressing indirect taxes on the privilege of doing business in interstate commerce. While there has certainly been an expansion of the concept announced in *Complete Auto Transit*, and this Court has consistently held that interstate commerce may be obliged to bear its fair share of the cost of services provided by the state governments, this Court has **never** permitted a direct excise tax to be imposed upon the value of the commodity which is itself being transported in interstate commerce.

Both *Spector* and *Complete Auto Transit* involved taxes on the privilege of doing business. *Complete Auto Transit*, from which the modern four-prong test has evolved, involved a franchise tax for the privilege of doing business in Mississippi which tax was determined based upon the gross sales or gross income derived from the activity within the State of Mississippi. Complete Auto Transit was in the business of transporting motor vehicles from the General Motors assembly plants located outside of Mississippi to dealers in Mississippi. Complete Auto Transit was assessed a Mississippi franchise tax based upon the gross receipts from the sale of services in the State of Mississippi. The tax in *Complete Auto Transit* was not a tax upon the **value** of the vehicles being moved in interstate commerce, rather it was a tax based upon the income derived by the carrier from transportation services actually provided within the State of Mississippi. In that decision, this Court established what has become known as the four-prong test of *Complete Auto Transit*, noting, that to avoid conflict with the Commerce Clause, the challenge tax (1) must have a sufficient nexus with the state imposing the tax, (2) must be fairly apportioned, (3) must not discriminate against interstate commerce, and (4) must be reasonably related to the services provided by the taxing state.

The next major Commerce Clause decision rendered by this Court following *Complete Auto Transit* with respect to imposition of state taxes, was *Commonwealth Edison Company v. Montana, supra*, p. 13. In that case, the tax involved was a severance tax on the coal severed from within the State of Montana. The Court specifically rejected the distinction in *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 67 L.Ed. 237, 43 S.Ct. 83 (1922), and its rationale that required a determination of whether the tax was imposed before the coal was in the stream of interstate commerce or after it was in interstate commerce. The Court applied the *Complete Auto Transit* test in determining whether the Montana severance tax violated the provisions of the constitutional restraints on interstate commerce. However, the coal at issue had been in the ground in Montana and was physically a part of the property of the State of Montana long before it was severed, which event created the severance tax.

In *D. H. Holmes Co., Ltd. v. McNamara*, 486 U.S. 24, 100 L.Ed.2d 21, 108 S.Ct. 1619 (1988), while this Court stated that it made little difference for Commerce Clause purposes whether the catalogs at issue therein were within or outside the stream of interstate commerce, this Court did note that the catalogs which were being subjected to a use tax by the State of Louisiana (82% of the catalogs) did physically come to rest within that State.

Thus, in each of the cases where a direct excise tax, a sales tax, a use tax or a severance tax was at issue, the goods and products being subjected to the state excise tax had, in fact, come to rest within the state and become a part of the mass of the property of the taxing state, either before the interstate transportation began or after the products were removed from interstate commerce. This Court has **never** authorized the direct imposition of an unapportioned excise tax upon the **value** of the goods and products actually being transported in interstate commerce, while those articles remain in the stream of interstate commerce.

This is the issue presented here. As was the situation in *Midwestern Gas*, *Texas Gas*, and *Michigan Wisconsin Pipeline*, the facts are undisputed that the natural gas at issue in these proceedings never was removed from interstate commerce and never came to rest within the State of Arkansas before it was consumed as fuel for the interstate compressors. This gas was consumed totally within the confines of the interstate pipeline system. Thus, while this Court has (1) authorized a state tax upon the privilege of doing business in interstate commerce (based upon the proceeds derived from that interstate commerce activity within the taxing state); and (2) permitted a severance tax upon minerals which were physically part of the state before they entered interstate commerce (irrespective of whether the actual severance was within or without the stream of interstate commerce); and (3) permitted the imposition of a use tax on the printing and associated cost for the publication of a catalog which did physically come to rest within the taxing state (although those costs and expenses were paid outside the taxing state); and (4) permitted a use tax to be imposed upon the value of aviation fuel when it had been

withdrawn from the stream of interstate commerce; the Petitioner submits that this Court has **never** authorized the imposition of a franchise tax based upon the **value** of the goods being transported in interstate commerce, nor has it authorized a tax by any intermediary state upon the **value** of coal through which such coal may have been transported on its journey in interstate commerce, nor has it permitted the taxation of the **value** of the catalogs at issue in *D. H. Holmes* by the states through which those catalogs passed on their journey from the publisher to the customers at their ultimate resting place in Louisiana.

Ultimately, Arkla submits that, while this Court has overruled the *Spector* decision with respect to indirect type taxes, there remains the "bright-line" rule of *Helson* which necessarily prohibits the direct taxation of the **value** of goods and products being moved in, or consumed within, interstate commerce. Thus, the *Complete Auto Transit* rationale is not the appropriate or even the controlling test with respect to state excise taxes that are imposed directly upon the value of the article in the flow of interstate commerce, which is solely what is at issue here. This Court has never pronounced that the *Complete Auto Transit* four-prong test is the **only** test which a sales or use tax must pass to avoid conflict with the Commerce Clause. The "bright-line" rule of the *Helson* rationale remains viable where the state tax is a direct excise tax based upon the value of the fuel consumed within an instrumentality of interstate commerce. This is especially true where the fuel itself actually is the article being transported in interstate commerce.

This Court, in its very recent decision in *Quill Corporation v. North Dakota*, 119 L.Ed.2d 91, 112 S.Ct. 1904 (1992), stated:

> [A]lthough our Commerce Clause jurisprudence now favors more flexible balancing analyses, **we have never intimated a desire to reject all established 'bright-line' tests**. Although we have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use

taxes, that silence does not imply repudiation of the *Bellas Hess* rule.

* * *

> In contrast, the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. (Emphasis supplied.) 119 L.Ed.2d 91, 108; 112 S.Ct. 1904, 1914.

Helson reflects such a realm of commercial activity -- the direct taxation of the value of articles of commerce (i.e. natural gas) that are themselves consumed in the transportation of these articles in interstate commerce. Such an attempt to impose an unapportioned state excise tax is simply an impermissible burden on interstate commerce. For these reasons the Petitioner submits that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the [*Helson*] rule remains good law." 119 L.Ed.2d 91, 110; 112 S.Ct 1904, 1916. This Court should therefore grant the petition in this case to state that it retains the bright-line rule of *Helson*.

C. Summary.

The Courts denial of this writ application will open the floodgate of taxing activities by the states on the value of products being transported in interstate commerce. If the natural gas at issue in this case can be taxed, then the airline fuel consumed by planes passing over the several states can be taxed by those states, the diesel fuel burned by the trains passing through Arkansas and by the boats moving barges on navigable streams in Arkansas can likewise be taxed.

The prohibition of state taxation announced by the "bright-line" rule established by this Court in *Helson* is correct and this Court has meticulously chosen not to overrule it. This "bright-line" rule has been retained to prohibit precisely the type of state tax that is imposed in this situation -- a direct and unapportioned excise tax on the value of goods and products in the actual flow of interstate commerce, a small part of which are themselves consumed in the transportation of similar items in interstate commerce. The Court must grant this petition for certiorari, hear this case, and reverse the Arkansas Supreme Court's erroneous decision in this regard so as to settle the existing conflicts among the decisions of the highest appellate courts of the various states on this important issue, to clearly reaffirm the Court's "bright-line" rule on this issue, and to preserve the purpose for which the drafters of the Constitution included the Commerce Clause.

II.

ARKANSAS CANNOT IMPOSE ITS SALES TAX ON A PURCHASE TRANSACTION THAT IS COMPLETED OUT-OF-STATE; *McLEOD V. J.E. DILWORTH CO.*

The state excise tax imposed in this case is a sales tax (under Ark. Stat. Ann. §§84-1902(d) and 1903(b))[8] not a compensating use tax (under Ark. Stat. Ann. §84-3105(a)).[9] While Arkla maintains that neither of these excise taxes could be constitutionally imposed for the reasons set forth in Argument I above, it should be unquestioned, as a threshold matter, that a sales tax may not be imposed directly upon the commodity being transported in interstate commerce when the sales transaction was completed beyond the borders of the taxing state.

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[8] Ark. Code Ann. §26-52-103(a)(4) and 301(2); *infra*, 28a and 29a.

[9] Ark. Code Ann. §26-53-106(a); *infra*, 32a.

As the dissenting opinion below, authored by Associate Justice Glaze, so appropriately noted:

> The state's point in distancing itself from *Questar* is, like the three cases cited above by Arkla, the Utah decision involved a use tax, not a sales tax. Why the distinction? The state is aware of Arkansas law, Ark. Code Ann. § 26-53-106 (Supp. 1991) [*infra*, App. D, 36a], and this court's decisions construing it. That statute provides in pertinent part as follows:
>
> (a) There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, distributing, or consuming within this state any article of tangible personal property purchased for storage, use, distribution, or consumption in this state at the rate of three percent (3%) of the sales price of the property.
>
> (b) This *tax will not apply* with respect to the storage, *use*, distribution, *or consumption of any* article of tangible *personal property* purchased, *produced*, or manufactured *outside this state until* the transportation of *the article* has finally *come to rest within this state* or until the article has become commingled with the general mass of property of this state. (Emphasis added [by the Court].)
>
> In interpreting the foregoing statute, we have said that if the goods have not 'come to rest' within the state, they are still in the stream of interstate commerce, and a tax may not be levied. *Martin v. Riverside Furniture Corp.*, 292 Ark. 399, 730 S.W.2d 483 (1987).

> *In the present case, the evidence stands unrefuted that the fuel involved has not (and would never) 'come to rest.'* Being cognizant of this fact, the state is aware it is unable under Arkansas law to levy a tax on Arkla's fuel unless it can do so under a theory other than one pertaining to use tax. Consequently, it contends the Arkla fuel is subject to Arkansas's sales tax, which does not necessarily depend upon the fuel coming to rest in this state.[10]

In a decision rendered almost fifty years ago (in another appeal from the Arkansas Supreme Court), *McLeod v. J. E. Dilworth Co., supra*, p. 7, a case that interpreted these same basic statutory provisions, this Court held that a state's **sales** tax could **not** be imposed upon interstate sales which originated and were completed in another state. This Court concluded that the states had the power to create a "compensating" use tax to be imposed upon such sales once the tangible personal property came to rest within the taxing state's borders and was thus removed from the flow of interstate commerce. As the Court clearly stated in its *Dilworth* decision:

> Whatever might be the fate of such a tax were it before us, the not too short answer is that Arkansas has chosen not to impose such a use tax, as its Supreme Court so emphatically found.
>
> A sales tax and a use tax in many instances may bring about the same result. **But they are different in conception, are assessments upon different transactions, and the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase -- a freedom**

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[10] *Infra*, App. A, 9a–10a.

> **which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased.** In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the Commerce Clause was meant to end. (Emphasis supplied.) 322 U.S. 327, 330; 88 L.Ed. 1304, 1307.

This Court has consistently approved this interrelated complimentary scheme of excise taxation, ever since it first "constitutionally" approved a compensating use tax (Washington's) in its decision in *Henneford v. Silas Mason Co., Inc.*, 300 U.S. 577, 81 L.Ed. 814, 57 S. Ct. 524 (1937). However, the Court has continued to recognize and adhere to the principle that a state may **not** impose its **sales** taxes directly upon property while it is in the flow of interstate commerce and the **sales** tax may not reach beyond the taxing state's own borders. Property must have ultimately come to rest within the taxing jurisdiction and become commingled with all other property within the taxing jurisdiction or the sale must have been consummated within such jurisdiction before the value of the property can be subjected to a state's sales or use tax in this type of factual situation.[11]

The facts of this case clearly establish that the natural gas which Arkla used as interstate compressor fuel at the three compressor stations along its interstate transmission pipelines located in Arkansas was natural gas, virtually all of which was purchased outside of Arkansas and it was still in the actual flow of interstate commerce when it was consumed. This natural gas did not "come to rest" in Arkansas because it was consumed while remaining in the flow of interstate commerce (although that

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[11] *See, Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 83 L.Ed. 586, 59 S.Ct. 389 (1939).

consumption occurred within the boundaries of the State of Arkansas).

Here, Arkansas chose to impose a **sales** tax (a tax under the Arkansas Gross Receipts Act of 1941), not a **use** tax, upon the value of the natural gas consumed by the Company's interstate compressors. The precise statutory provisions of Ark. Stat. Ann. §84-1902(d),[12] as they are pertinent to these proceedings, provide:

> (3)(A) "Sale" is declared to mean the transfer of either the title or possession, except in the case of leases or rentals, for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or devise by which the transfer is accomplished.
>
> (B) "Sale" is also declared to include the exchange, barter, lease, or rental of tangible personal property.
>
> (4) . . . The term "gross proceeds" or "gross receipts" shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person;

While Arkansas can define, and does define the "gross receipts" subject to taxation, it can not change the fact that any "sale" of the natural gas that was consumed in the interstate compressors occurred (in the vast majority of the cases) far back up that interstate pipeline in the states of Oklahoma, Kansas and Texas. The sale in *Dilworth* occurred in Tennessee, with the goods being transported in interstate commerce into Arkansas, and this Court held that Arkansas could not impose its **sales** tax upon the

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[12] Ark. Code Ann. §26-52-103(a), App. D, 27a-28a.

Tennessee sale. So here, Arkansas may not reach back up the interstate pipeline to the point of the sales transactions where Arkla purchased the natural gas in question (generally in Oklahoma, Kansas and Texas, if at all[13]), to impose its **sales** tax. The sale to Arkla of the natural gas consumed as compressor fuel occurred, if at all, when Arkla purchased the gas at the various points of delivery, primarily in Oklahoma, Texas, Kansas and Louisiana. The State of Arkansas cannot make the consumption of the compressor fuel a "sale" of gas from Arkla to itself at the point of consumption while the gas is being transported in the flow of interstate commerce, solely for purposes of imposing a **sales** tax. The withdrawal of natural gas in Arkansas from the Company's interstate transmission pipelines for use as compressor fuel is precisely, as this Court appropriately noted in *Dilworth*, a **use**, "the enjoyment of that which was purchased."[14] Thus, only a **use** tax could possibly be imposed upon such consumption, and Arkansas' attempt to impose its **sales** tax must be prohibited, as a threshold matter, as was so aptly noted by the dissenting justices in the court below.

The only excise tax which the State of Arkansas could have possibly imposed upon the consumption of a part of the natural gas in question, under the rulings of this Court, would have been its **use** tax -- but the Arkansas **use** tax cannot be imposed because the statute provides, rightfully so, that the use tax "will not apply . . . until the article has finally come to rest within this state or until the article has been commingled with the general mass of property of this state."[15]

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[13] The "if at all" has reference to the fact that some very small portion of the gas was produced by the Company itself, thus there was never a "purchase" of such gas at all, and thus there was no "sale" thereof.

[14] *McLeod v. J. E. Dilworth Co.*, *supra*, p. 7, 322 U.S. at 330, 88 L.Ed. at 1307.

[15] Ark. Stat. Ann. §84-3105(a), Ark. Code Ann. §26-53-106(b), *infra*, App. D, 32a.

Therefore, the Arkansas sales tax could never have been applicable here, because the sales transactions occurred (almost exclusively) in other states into which Arkansas cannot reach to impose its sales tax under the express holding of this Court in *Dilworth*. This Court must correct this threshold error in the decision of the Arkansas Supreme Court, by granting the petition and reversing the erroneous decision below that ignored not only its own precedent, but also the longstanding precedent of this Court that clearly settled this issue nearly fifty years ago.

CONCLUSION

For the reasons set forth above, the Petitioner submits that its Petition for a Writ of Certiorari to the Arkansas Supreme Court should be granted. Hearing this case will give this Court the opportunity to reiterate and emphasize the premise recently restated in *Quill* -- while all cases involving the state taxation of interstate commerce must pass the four-prong tests of *Complete Auto Transit*, in certain "bright-line" areas, passing that test alone is not sufficient to avoid Commerce Clause scrutiny. Two such "bright-line" areas are violated by the majority opinion of the Arkansas Supreme Court in this case.

First, *Helson* directs that no direct sales or use tax may be levied upon fuel consumed in the movement of goods in interstate commerce. Second, *Dilworth* prohibits a state from imposing a sales tax upon a purchase which was completed in another state. These significant errors by the Arkansas Supreme Court in the application of the principle of *stare decisis* in following this Court's precedents with respect to the Commerce Clause's restrictions upon state taxation of interstate commerce provide sufficient reason for the Court to grant the petition, under its general supervisory powers, to rectify these clear errors.

Respectfully submitted,

JULY 31, 1992

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APPENDIX A

SUPREME COURT OF ARKANSAS
No. 91-136
Opinion Delivered MAR 30 1992

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES, DEPARTMENT OF
FINANCE & ADMINISTRATION,
STATE OF ARKANSAS,

APPELLANT,

V.

ARKLA, INC.,

APPELLEE.

Appeal From the Pulaski County Chancery
Court, Second Division, No. 88-0282,
Hon. Jack Ruple, Special Chancellor

JACK HOLT, JR., Chief Justice

The main issue in this case concerns the authority of the Department of Finance and Administration for the State of Arkansas (DFA) to tax the natural gas taken by the appellee, Arkla, Inc. (Arkla), from its interstate transmission pipelines located in Arkansas to fuel compressors at its compressor stations and Arkla's entitlement to an exemption from such a tax.

Arkla is a Delaware corporation which has its principal places of business in Little Rock, Arkansas, and Shreveport, Louisiana. During the period of January 1, 1976, through February 28, 1987, Arkla was engaged in the business of producing, buying, transporting, and selling natural gas in the states of Arkansas, Louisiana, Kansas, Oklahoma, and Texas. Arkla bought natural gas in these states and transported it through its interstate

transmission pipelines to points in those states where the gas was metered for sale to residential, industrial, and commercial customers.

To facilitate the transportation of the natural gas, Arkla maintained compressor stations to pump the gas along the interstate transmission pipeline. Three of these compressor stations are located in Arkansas and are at issue in this case because Arkla diverted some of the natural gas in the interstate pipeline to power the compressors at the stations.

In February 1979, Arkla filed a claim with the DFA for credit of the Arkansas sales tax ($31,222.18) that it had paid from January 1976 through December 1978 on this fuel. The DFA did not respond to Arkla's claim, whereupon Arkla claimed the credit on its 1980 Arkansas sales tax report. Subsequently, Arkla did not report any state or local taxes attributable to the value of the natural gas consumed as compressor fuel at the three compressor stations.

The DFA audited Arkla's Arkansas sales tax reports filed for the periods from January 1, 1980, through February 28, 1987, and proposed deficiency assessments of additional sales tax, penalties, and interest based on its determination that the compressor fuel was taxable.

Arkla protested the DFA's proposed assessments to the DFA's Hearing Board, which sustained the assessments. Arkla then paid, under protest, the amounts in controversy and filed this suit for refund in the Pulaski County Chancery Court. From the Special Chancellor's judgment in favor of Arkla, the DFA appeals and asserts four points of error: 1) that the chancellor erred in finding that Arkla has shown its entitlement to an exemption beyond a reasonable doubt, 2) that the chancellor erred in allowing Arkla to take a credit without a showing that the statutory requirements of the Tax Procedure Act had been met, 3) that the chancellor erred in finding that the penalty assessed by the DFA was without basis, and 4) that the chancellor erred in its award of attorneys' fees.

We agree that the chancellor erred in finding that Arkla has shown its entitlement to an exemption from the Arkansas Gross Receipts Tax Act of 1941 (Tax Act) beyond a reasonable doubt and reverse and remand.

In *Ragland v. Dumas*, 292 Ark. 515, 732 S.W.2d 118 (1987), we noted that the standard of review for tax exemption cases is trial *de novo* on the record, and we will not reverse the chancellor's findings of fact unless they are clearly erroneous. Further, the party claiming an exemption from taxes has the burden of proving his entitlement beyond a reasonable doubt; tax exemptions must be strictly construed against exemption, and to doubt is to deny the exemption. (Citations omitted.)

Arkansas Code Ann. § 26-52-301 (Supp. 1991) addresses the tax levied under the Tax Act and provides in pertinent part that "[t]here is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following: . . . 2) Natural or artificial gas .. . ." Ark. Code Ann § 26-52-103(a)(4) (Supp. 1991) defines the terms "gross proceeds" and "gross receipts" to include "the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person."

Arkla does not assail the nature of the tax, i.e. a sales rather than a use tax; it challenges the State's authority to enforce such a tax on the basis that 1) U.S. Const. art 1, § 8, cl. 3 (the Commerce Clause) allows Congress to regulate commerce among the several states and thus prohibits the imposition of a sales tax by the State in this instance, and 2) it claims an exemption from the Tax Act under Ark. Code Ann. § 26-52-401(16) (Supp. 1991), which provides that there is specifically exempted from the tax imposed by the Tax Act "[g]ross receipts or gross proceeds derived from sales for resale which the state is prohibited by the Constitution and laws of the United States from taxing or further taxing, or which the state is prohibited by the Arkansas Constitution from taxing or further taxing."

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), a movement case that held that a state privilege tax on the business of moving goods in interstate commerce is not *per se* unconstitutional, the United States Supreme Court rules that a state tax will be sustained against a commerce clause challenge when the tax 1) is applied to an activity with a substantial nexus with the taxing State, 2) is fairly apportioned, 3) does not discriminate against interstate commerce, and 4) is fairly related to the services provided by the State.

Later, the Supreme Court applied the *Complete Auto* factors, and reinforced its position, in *Washington Rev. Dept. v. Stevedoring Assn.*, 435 U.S. 734 (1978), and determined in that case that the State of Washington's business and occupation tax did not violate the Commerce Clause by taxing the interstate commerce activity of stevedoring within the state even though it was a direct tax on the privilege of conducting interstate business. The Court noted that "[a]ll tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity."

Most recently, the Supreme Court of Utah in *Questar Pipeline Co. v. Utah State Tax Comm'n*, 817 P.2d 316 (Utah 1991), has held that the tax commission did not violate the commerce clause by applying a use tax to compressor-fuel gas that was diverted from the flowing gas in Questar's interstate pipeline and consumed in fueling its compressors. Although the only prong of the *Complete Auto* test that was at issue in that case was the "substantial nexus" point, the court's analysis of the constitutional issue and prior case law is persuasive:

> One of the principal cases upon which Questar [and in this case, Arkla] relies is *Midwestern Gas Transmission Co. v. Wisconsin Dept. of Revenue*, 84 Wis.2d 261, 267 N.W.2d 253 (1978). In that case, the taxpayer, a foreign corporation, was an interstate pipeline company that purchases natural

gas from outside the state and sold it to customers within the state. The pipeline operations included two compressors located within Wisconsin that, as in this case, took gas from the pipeline stream in order to fuel the compressors. *Id.* 267 N.W. 2d at 253–54. The *Midwestern Gas* court found that there was not sufficient nexus to justify taxation. *Id.* at 258. Although at first glance the facts of *Midwestern Gas* and this case appear similar, we conclude that this court must reach a different result for the following reasons.

First, in declaring the pipeline company's consumption nontaxable, the *Midwestern Gas* court relied in part on the "comes to rest" doctrine. *See id.* at 255–56. That doctrine has subsequently been discredited by the Supreme Court as no longer applicable or relevant under the *Complete Auto* test. See *D.H. Holmes Co. v. McNamara*, 486 U.S. 24 (1988). Further, there are some significant factual differences between *Midwestern Gas* and this case. Here, some of the gas originates within the state of Utah, which was not the case in *Midwestern Gas*. Also, Questar is not a foreign corporation; its operations are based in Utah. Under the reasoning of *National Geographic*, Questar's operations as a whole have a much clearer nexus with the state of Utah than the taxpayer had with Wisconsin in *Midwestern Gas*.

In this case, Questar is a Utah corporation with corporate offices in the state. It owns and operates an extensive network of pipelines through the state and conducts transportation, sales, and storage activities here. Without the activity taxed – the direct diversion of gas from Questar's pipeline to fuel the compressors – the entire operation would

> cease to function. We affirm the Commission's conclusion that Questar, through its activities in conducting the operations of the pipeline and compressors, does have a substantial nexus with the state and the gas used to fuel those compressors is subject to Utah's use tax . . .

Applying the *Complete Auto* factors and *Washington Rev. Dept. v. Stevedoring Assn., supra*, rationale to this case, we note that Arkla has presented no facts that would justify invalidation of the sales tax. The obvious nexus between Arkla and the State of Arkansas is supported by the fact that some of the gas in Arkla's pipeline originates in Arkansas and, although Arkla is a Delaware corporation, one of its two stated principal places of business is in Little Rock, Arkansas. Also, as in *Questar*, Arkla owns and operates an extensive network of pipelines through Arkansas in which it produced, bought, transported, and sold natural gas. Consequently, there is a substantial nexus between Arkla and Arkansas to satisfy the first point of the *Complete Auto* test.

Next, in determining that the tax is fairly apportioned, we find it significant that the gas at issue is actually consumed in Arkansas; only that gas consumed in the state is subject to the tax, and no other state will tax the withdrawn gas once it is consumed.

In assessing the third factor, we find that Arkla has not shown how the tax at issue discriminates against interstate commerce.

Finally, the State of Arkansas provides numerous services to Arkla, and there is nothing in this record which suggests that Arkla doesn't avail itself of all of the amenities provided by the State to businesses operating within the state, i.e. police and fire protection, access to roads, etc. Therefore, nothing in the record suggests that the tax is not fairly related to the services and protection provided by the state.

Accordingly, for the foregoing reasons, we find that the elements encompassed in the *Complete Auto* test have been

satisfied, and, consistent with *Complete Auto*, *supra*, and *Washington Rev. Dept. v. Stevedoring Assn.*, *supra*, the imposition of a sales tax on the fuel consumed in Arkla's compressor stations is not constitutionally impermissible and that Arkla is not entitled to an exemption under section 26-52-401(16). Consequently, we need not address the DFA's remaining three arguments, and the judgment of the trial court is reversed and remanded.

Glaze and Corbin, JJ., dissent.

SUPREME COURT OF ARKANSAS

No. 91-136

Opinion Delivered MAR 30 1992

JAMES C. PLEDGER, COMMISSIONER
OF REVENUES, DEPARTMENT OF
FINANCE & ADMINISTRATION,
STATE OF ARKANSAS,

APPELLANT,

V.

ARKLA, INC.,

APPELLEE.

DISSENTING OPINION

TOM GLAZE, Associate Justice

The majority decision raises more questions than it answers. Basically it relies upon the cases of *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 244 (1977), and *Questar Pipeline Co. v. Utah State Tax Comm'n*, 817 P.2d 316 (Utah 1991), to reverse the trial court's holding that Arkansas could not constitutionally impose a sales tax on the fuel consumed in Arkla's compressor stations.

In reaching its result, the majority opinion fails to mention three cases cited by Arkla that were decided before and after *Complete Auto* and appear to go contrary to this court's decision. *See Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, 84 Wis. 2d 261, 267 N.W.2d 253, *cert. denied*, 439 U.S. 997 (1978), (a case that presented a factual situation similar to the one hear and where the Wisconsin Supreme Court held Wisconsin's

attempt to impose a use tax upon natural gas consumed as compressor fuel at the pipeline's interstate compressor stations in Wisconsin was prohibited by the Commerce Clause); *see also* similar use tax on compressor fuel cases predating *Complete Auto*, *Texas Gas Transmission Corp. v. Benson*, 444 S.W.2d 137 (Tenn. 1969), and *Michigan Wisconsin Pipeline Co. v. State*, 58 Mich. App. 318, 227 N.W.2d 334 (Mich. App. Div. 2 1975).

Also, the *Questar* decision cited by the majority is not embraced by Arkla or the state. In fact, the state recognizes the weakness of *Questar*, stating that "if [this] court chooses to follow the rationale of the Utah Supreme Court in the *Questar* decision, legal and factual distinctions between the cases should be clearly outlined." The majority opinion ignores the state's request.

The state's point in distancing itself from *Questar* is, like the three cases cited above by Arkla, the Utah decision involved a use tax, not a sales tax. Why the distinction? The state is aware of Arkansas law, Ark. Code Ann. § 26-53-106 (Supp. 1991), and this Court's decisions construing it. That statute provides in pertinent part as follows:

> (a) There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, distributing, or consuming within this state any article of tangible personal property purchased for storage, use, distribution, or consumption in this state at the rate of three percent (3%) of the sales price of the property.
>
> (b) This *tax will not apply* with respect *to* the storage, *use*, distribution, *or consumption of any* article of tangible *personal property* purchased, *produced*, or manufactured *outside this state until* the transportation of *the article* has finally *come to rest within this state* or until the article has become commingled with the general mass of property of this state. (Emphasis added.)

In interpreting the foregoing statute, we have said that if the goods have not "come to rest" within the state, they are still in the stream of interstate commerce, and a tax may not be levied. *Martin v. Riverside Furniture Corp.*, 292 Ark. 399, 730 S.W.2d 483 (1987).

In the present case, the evidence stands unrefuted that the fuel involved has not (and would never) "come to rest." Being cognizant of this fact, the state is aware it is unable under Arkansas law to levy a tax on Arkla's fuel unless it can do so under a theory other than one pertaining to use tax. Consequently, it contends the Arkla fuel is subject to Arkansas's sales tax, which does not necessarily depend upon the fuel coming to rest in this state.

The state argues the standard in a sales tax case is "did the sale occur in Arkansas?" It then suggests that, under Ark. Code Ann. § 26-52-103(a)(4) (Supp. 1991), the sale here occurred when Arkla withdrew its gas from its pipeline for its own consumption. The state cites *Georgia Pacific Corp. v. Larey, Commr.*, 242 Ark. 428, 413 S.W.2d 868 (1967), and theorizes that, while no actual transfer or sale is made by Arkla to a buyer, Arkla, in withdrawing the small amount of fuel here, is actually transferring that fuel from "Arkla the Interstate Shipper" to "Arkla the Consumer of Natural Gas."

The state's argument is ingenious, but ignores the record in this case. At each compressor station along Arkla's interstate transmission line, Arkla diverts a small amount of natural gas in transit and burns that gas only to power the compressors that work to continue the gas in route to destinations in other states. Arkansas cases such as *Georgia Pacific* are authority for imposing a sales tax on property withdrawn from a company's stock when the withdrawn property is utilized for the *company's own personal use*. Again, the evidence reflects that the small amount of fuel diverted for compressor purposes is constantly flowing and is consumed within no more than three minutes of its being diverted from the mass of gas being transported in the interstate transmission pipeline. The compressor fuel is not withdrawn from Arkla's personal or domestic use. The diverted gas is never metered in Arkansas or regulated by the Arkansas Public Service

Commission. Instead, such gas is regulated and controlled entirely by the Federal Energy Regulatory Commission.

In conclusion, the majority opinion attempts to sidestep the issue bearing on the state's authority under Arkansas law to impose a tax by stating Arkla never assailed the nature of the tax, i.e., sales versus use. In making such statements, the majority court conveniently ignores the state's own argument which is predicated upon the fact that it imposed a sales rather than a use tax on Arkla's compressor fuel. As mentioned above, the state, in view of the evidence presented in this case, cannot justify a use tax under Arkansas law because the fuel had never "come to rest" within the state. For this and other reasons, the state insisted below, and in this appeal, that the nature of the tax imposed is significant. To reiterate, the state emphasized that, if this court relies upon Utah's *Questar* case (which the majority cites), the court should clearly outline why. The state's reason for making such a request is because the court in *Questar* appeared to justify the Utah tax as a use tax on compressor-fuel gas, which differs significantly from the sales tax theory the state asserts here.

The state wishes to accept the result reached in the *Questar* decision, but it cites *not one case* involving compressor-fuel where a court has upheld a tax, as a *sales* tax, on such fuel.[1] The *Questar* case reaches the result the state here seeks, but the use tax rationale that underpins that decision creates other potential problems for the state which I have already described above.

I agree with the majority opinion that the Commerce Clause does not necessarily forbid a state from imposing a tax on

---

[1] The recent case of *Tennessee Gas Pipeline Co. v. Marx*, 90-CC-1253 (Miss. February 5, 1992) (decided after the present case was submitted and argued on appeal), upheld Mississippi's imposition of a *use* and excise *tax* on compressor fuel that was used by the Tennessee Company for the same purposes and in the same manner Arkla used its compressor fuel, *viz.*, to propel natural gas through an interstate pipeline. This Mississippi decision seems to be consistent with the *Questar* holding.

interstate activity. However, that is not the threshold issue in this case. Under the facts and Arkansas law here, Arkansas clearly is unauthorized to impose a sales or use tax. The state's characterization of Arkla's burning of its compressor fuel as a withdrawal, transfer, or sale falls short of the requirements and express purposes of Arkansas's Gross Receipts Law, § 26-52-103(a)(4). Nor can a use tax be assessed when the fuel in question has never come to rest in this state. The decision reached by the trial court is correct and should be affirmed.

For the foregoing reasons, I respectfully dissent.

CORBIN, J., joins this dissent.

APPENDIX B

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
SECOND DIVISION

ARKLA, INC. — PLAINTIFF

VS. — NO. 88-0282

JAMES C. PLEDGER,
COMMISSIONER OF REVENUE,
DEPARTMENT OF FINANCE
AND ADMINISTRATION,
STATE OF ARKANSAS — DEFENDANT

MEMORANDUM OPINION

Trial was held in this case on October 22, 1990, at which time the Court admitted into evidence the extensive Joint Stipulation of Facts ("Jt. Stip.") as submitted by the parties, with exhibits attached thereto, the testimony of witnesses for both the Plaintiff and Defendant and certain documentary evidence. From this evidentiary record, and based upon the authorities cited in the briefs and oral arguments of counsel for both parties, the Court makes the following Finding of Fact and Conclusions of Law.

FINDINGS OF FACT

I. Arkla, Inc. is a corporation organized and existing under the laws of the State of Delaware, with its principal places of business and commercial domicile located in Little Rock, Arkansas and Shreveport, Louisiana, and is duly qualified to do and doing business in the State of Arkansas. (Jt. Stip. ¶1).

II. During the period January 1, 1976 through February 28, 1987, Arkla, Inc. (or its predecessor in name, Arkansas Louisiana Gas Company) was a company in the business of producing, buying, transporting and selling natural gas, and had transmission and distribution facilities in the states of Arkansas, Louisiana, Kansas, Oklahoma and Texas. (Jt. Stip. ¶2).

III. During the entire period in suit, Arkla would cause some of the natural gas being transported in interstate commerce to be bled off of the interstate natural gas transmission pipelines and consumed as compressor fuel at three of its compressor stations located within the State of Arkansas. These compressors were used exclusively to maintain the desired pressure in the Company's interstate natural gas pipelines to move its natural gas from out-of-state into, through, and out of Arkansas. The three compressor stations at issue in these proceedings, known as the Beirne, Taylor and Dunn Compressor Stations, were each constructed and operated under the authority of Certificates of Public Convenience and Necessity issued by the Federal Energy Regulatory Commission (herein "FERC") or its predecessor, the Federal Power Commission. (Jt. Stip. ¶5, Test. of Messers. Flanigan and Shafer).

IV. The Beirne and Taylor compressor stations are each located on the Company's Line S. (Jt. Stip. ¶6).

V. Plaintiff's Line S, which originates in Texas and continues until its junction with Lines BT--1, BT-1A and certain other lines at Perla, Arkansas, is an interstate natural gas transmission pipeline constructed and operated pursuant to and under the authority of the FERC. (Jt. Stip. ¶6, Ex. A, Test. of Mr. Shafer).

VI. The Beirne and Taylor compressor stations were certificated pursuant to Certificates of Public Convenience and Necessity issued by the Federal Power Commission in 1953 and 1954, respectively, and continue to be operated pursuant thereto. (Jt. Stip. ¶7, Exs. B and C).

VII. The primary use of the Beirne and Taylor Compressor Stations during the years at issue was for the compression of natural gas for the purpose of transporting the natural gas in Line S either toward Louisiana or toward Perla, Arkansas, in either case for further transportation within natural gas pipelines to be used in the transportation of natural gas in interstate commerce. (Jt. Stip. ¶8).

VIII. For the years 1976, 1977 and 1978, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Beirne Compressor Station was $339.84, $966.15, and $220.32 for those years, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶9, Ex. D).

IX. For the years 1980, 1981, 1982 and the period January 1, 1983 through June 30, 1983, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Beirne Compressor Station was $231.06, $312.92, $412.63, and $178.16 for those periods, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶10, Ex. E).

X. For the period July 1, 1983 through December 31, 1983 and for the years 1984, 1985, 1986, and the period January 1, 1987 through February 28, 1987, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Beirne Compressor Station was $197.39, $891.13, $487.89, $235.78, and $42.19 for those periods, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶11, Ex. F).

XI. For the years 1976, 1977 and 1978, the State of Arkansas sales tax alleged to be due with respect to the value of natural gas consumed in the operation of the compressors located at the Taylor Compressor Station was $1.53, $782.49,

and $1,355.07 for those years, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶12, Ex. G).

XII. For the years 1980, 1981, 1982, and the period January 1, 1983 through June 30, 1983, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Taylor Compressor Station was $3,895.32, $5,286.99, $2,430.50, and $110.32 for those periods, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶13, Ex. H).

XIII. For the period July 1, 1983 through December 31, 1983, and for the years 1984, 1985, 1986, and the period January 1, 1987 through February 28, 1987, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Taylor Compressor Station was $387.60, $699.89, $5,449.69, $1,713.55, and $108.97 for those periods, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶14, Ex. I).

XIV. The Dunn compressor complex contains two separate compressor stations; the one, referred to as "Dunn Junction Compressor Station," is composed of two 1,100 horsepower Solar Saturn turbine compressors and is not at issue in this case. (Jt. Stip. ¶16, Exs. J and J-1).

XV. The other compressor station within the Dunn compressor complex, referred to as the "Dunn Compressor Station," contains four compressors which are identified as Units #1, #2, #3 and #4 on Exhibits J and J-1. The Dunn Compressor Station (interstate) is physically separated by about 100 yards and a creek from the Dunn Junction Compressor Station (intrastate). These two groups of compressors are housed in different buildings on the site and they serve different pipelines altogether. (Jt. Stip. ¶17, Ex. J and J-1 and Test. of Messers. Flanigan and Shafer).

XVI. Arkansas Louisiana Gas Company was authorized by the FERC to construct and operate the four compressors comprising the Dunn Compressor Station, identified as Units #1, #2, #3, and #4 on Exhibit J and J-1, based upon a finding by the FERC that the four compressors were to be used in the transportation and sale of natural gas in interstate commerce. (Jt. Stip. ¶18).

XVII. Certificates of Public Convenience and Necessity were issued by the FERC in 1963, 1965 and 1967 with respect to the construction and operation of the four compressor units of the Dunn Compressor Station. (Jt. Stip. ¶18, Ex. K, L and M).

XVIII. All natural gas which passed through the Dunn Compressor Station proceeded into the compressor station from Line O or Line O-1-O. (Jt. Stip. ¶19, Test. of Messers. Flanigan and Shafer).

XIX. Plaintiff's pipelines Line O and Line O-1-O are interstate natural gas transmission pipelines constructed and operated pursuant to and under the authority of the FERC. (Test. of Messers. Flanigan and Shafer).

XX. All natural gas discharged from the Dunn Compressor Station was ultimately dispatched into either Line OM-1 northward to Jane, Missouri, Line J toward Barfield, Arkansas or Line BT-1 and BT-1-A southward toward Perla, Arkansas. (Jt. Stip. ¶19, Test. of Messers. Flanigan and Shafer).

XXI. Plaintiff's Line OM-1, Line J, Line BT-1 and Line BT-1-A are each interstate natural gas transmission pipelines constructed and operated pursuant to and under the authority of the FERC. (Jt. Stip. ¶20, Test. of Messers. Flanigan and Shafer).

XXII. For the years 1976, 1977 and 1978, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Dunn Compressor Station was $7,789.85,

$8,816.18, and $10,950.75 for those years, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶21, Ex. N).

XXIII. For the years 1980, 1981, 1982, and the period January 1, 1983 through June 30, 1983, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Dunn Compressor Station was $30,504.84, $33,390.14, $30,243.85, and $10,447.75 for those periods, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶22, Ex. O).

XXIV. For the period July 1, 1983 through December 31, 1983, and for the years 1984, 1985, 1986, and the period January 1, 1987 through February 28, 1987, the State of Arkansas sales tax alleged to be due with respect to the value of the natural gas consumed in the operation of the compressors located at the Dunn Compressor Station was $13,733.47, $38,668.72, $48,930.54, $43,863.08, and $9,999.70 for those periods, respectively, which amounts were paid under protest by Plaintiff. (Jt. Stip. ¶23, Ex. P).

XXV. On January 15, 1987, after rendition of an opinion by the Administrative Law judge with respect to the precise issue presented to the Court, the Revenue Division assessed a deficiency of additional Arkansas Gross Receipts Tax on the value of the natural gas consumed by the compressors located at the Beirne, Taylor and Dunn Compressor Stations with respect to the period January 1, 1976 through June 30, 1983 as follows:

Sales tax with respect to compressor fuel consumed during the period January 1, 1976 through December 31, 1978	$31,222.18
Sales tax with respect compressor fuel consumed during the period January 1, 1980 through June 30, 1983	117,444.46
Local (Logan County) sales tax with respect to compressor fuel consumed during the period January 1, 1980 through June 30, 1983	3,482.58
Total sales tax attributable to compressor fuel consumed	$152,149.22
Miscellaneous taxable items	472.58
Miscellaneous local taxes unrelated to compressor fuel	1,297.55
Total Assessment	$153,919.35

(Jt. Stip. ¶27).

XXVI. On January 15, 1987, the Revenue Division also assessed a negligence penalty of $15,319.93 (corrected subsequently to $15,391.93), and interest in the amount of $80,026.00 with respect to such assessment of Arkansas Gross Receipts Taxes. (Jt. Stip. ¶27).

XXVII. Plaintiff timely paid, under protest, the assessment of the total amount of Arkansas Gross Receipts Tax, penalties, and interest with respect to the period January 1, 1976 through June 30, 1983, paying unto the Revenue Division, under protest, the sum of $249,337.28. (Jt. Stip. ¶28).

XXVIII. Plaintiff acknowledged that it did not seek recovery of the amount of tax paid attributable to the miscellaneous taxable items (in the amount of $472.58), nor paid with respect to the miscellaneous local taxes unrelated to compressor fuel (in the amount of $1,297.55). (Jt. Stip. ¶30).

XXIX. On February 18, 1988, the Revenue Division assessed a deficiency of additional Arkansas Gross Receipts Tax with respect to the value of the natural gas consumed as compressor fuel at the Beirne, Taylor and Dunn compressor stations for the period July 1, 1983 through February 28, 1987 in the amount of $165,409.63, together with local sales taxes related thereto of $3,617.45, plus it assessed a negligence penalty of $16,902.73, and interest in the amount of $43,025.53. (Jt. Stip. ¶¶31 and 32).

XXX. On February 5, 1988, Taxpayer paid, under protest, the assessment of the aforesaid amount of Arkansas Gross Receipts Tax, penalties, and interest with respect to the period July 1, 1983 through February 28, 1987, delivering unto the Revenue Division the sum of $228,955.34. (Jt. Stip. ¶33).

XXXI. Plaintiff timely initiated this suit for recovery of the amounts of Arkansas Gross Receipts Tax, penalties and interest which had been paid under protest to the Revenue Division. (Jt. Stip. ¶¶29 and 34).

XXXII. All of the natural gas at its point of entry into the Beirne Compressor Station, whether produced in Texas, Louisiana or Arkansas, or whether withdrawn from an underground natural gas storage reservoir in Louisiana, was natural gas which, at the moment of such entry into the

compressor station, was natural gas being transported in interstate commerce. (Test. of Mr. Shafer).

XXXIII. All of the natural gas at its point of entry into the Taylor Compressor Station, whether produced in Texas, Louisiana or Arkansas, or whether withdrawn from an underground natural gas storage reservoir in Louisiana, was natural gas which, at the moment of such entry into the compressor station, was natural gas being transported in interstate commerce. (Test. of Mr. Shafer).

XXXIV. All of the natural gas at its point of entry into the Dunn Compressor Station, whether produced in Oklahoma, Texas, or Arkansas, or whether withdrawn from an underground gas storage reservoir in Oklahoma, was natural gas which, at the moment of such entry into the compressor station was natural gas being transported in interstate commerce. (Test. of Mr. Shafer).

XXXV. The transportation and sale of the natural gas at its point of entry into each of the compressor stations was regulated and controlled by the FERC, not the Arkansas Public Service Commission. (Test. of Mr. Shafer).

XXXVI. The point of demarcation for the conversion of the natural gas classified as interstate natural gas (controlled and regulated by FERC) to intrastate natural gas (controlled by the Arkansas PSC) is when the natural gas is metered from the interstate lines and passes into the local distribution system or to large industrial customers (Test. of Messers. Flanigan and Shafer)

XXXVII. The value of the natural gas consumed as compressor fuel at Arkla's three compressor stations during the periods in suit was a part of the values considered by FERC in determining the weighted average cost of gas (WACOG) for purposes of determining the price Arkla could charge for its "interstate" gas. A separate WACOG was computed by the Arkansas PSC for purposes of determining the price that Arkla's

distribution company could charge for "intrastate" gas, and the value of the gas used to fuel the three interstate compressor stations was not used in computing the Arkansas PSC's WACOG. (Test. of Mr. Shafer).

XXXVIII. The natural gas which was withdrawn from the Company's interstate transmission pipelines and consumed as fuel to power the compressors described above never came to rest in the State of Arkansas. The natural gas withdrawn from such pipelines was consumed by the compressors at each of the three compressor stations within just a few minutes of being withdrawn from the interstate transmission pipelines and it never reached the metering points at which the Company's natural gas can be considered to have been converted from its "interstate" classification into an "intrastate" classification. (Test. of Mr. Flanigan).

FINDING OF ULTIMATE FACTS

1. The natural gas which was withdrawn from the interstate natural gas transmission pipelines and was consumed as fuel to power the compressors located at the Beirne, Taylor and Dunn Compressor Stations as described above remained in interstate commerce and never left the stream of interstate commerce prior to its consumption.

2. The consumption of natural gas as fuel to power the compressors described above was itself an integral part of the flow of natural gas in interstate commerce.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this litigation, pursuant to the provisions of Ark. Code. Ann. §26–18–406 and also 42 U.S.C. §1983.

2. All of the natural gas consumed as fuel in operation of the compressors located at the Beirne, Taylor and Dunn Compressor Stations was consumed strictly within the parameters of

interstate commerce and such natural gas never left the stream of interstate commerce before being consumed as fuel for these compressors.

3. The attempt by the Arkansas Revenue Division to impose the state sales tax upon the value of the natural gas consumed as fuel at the three above-described compressor stations, under the provisions of the Arkansas Gross Receipts Tax Act as a withdrawal from stock, was improper because the Court finds that the General Assembly did not intend for the "withdrawal from stock" provision (Ark. Code Ann. §26-52-103(a)(4)) to apply to this type of situation. Even if this "withdrawal from stock" provision might be applicable to Arkla's consumption of part of its natural gas as compressor fuel, then the Court holds that the imposition of Arkansas' sales tax would still be improper because such act by the Revenue Division represents and constitutes a direct tax, and an unapportioned direct tax, upon the product being transported in "interstate" commerce.

4. Any sales tax to be imposed by the State of Arkansas under the Arkansas Gross Receipts Tax statutes as a withdrawal from stock would constitute a direct tax on the product being transported in interstate commerce.

5. The Plaintiff has met its burden of proof in establishing that it is entitled to claim the benefits of the sales tax exemptions cited in Paragraph 7 of these conclusions of law. *Ragland v. Meadowbrook Country Club*, 300 Ark. 164, 737 S.W.2d 852 (1989).

6. The Plaintiff has also established that no penalty should have been assessed.

7. Any imposition by the State of Arkansas of its sales tax upon the value of the natural gas consumed as fuel in operation of Plaintiff's compressors at its "interstate" compressor stations, would constitute an unreasonable burden upon the transportation of natural gas in interstate commerce, since such

gas never "came to rest" within the State of Arkansas before being consumed. Therefore, the State of Arkansas is prohibited from imposing any such excise tax by the express exemptions set forth in Ark. Stat. Ann. §84-1904(l), Ark. Code Ann. §26-52-401(16), and the Commerce Clause of the Constitution of the United States (Art. 1, §8, Cls. 3).

8. Since the issue presented in this case regards an attempt by the State of Arkansas to impose a sales tax under circumstances where the Constitution of the United States prohibits such imposition, the State of Arkansas has thereby violated Plaintiff's civil rights under the provisions of 42 U.S.C. §1983, and pursuant to the provisions of 42 U.S.C. §1988, Plaintiff is entitled to an award of reasonable attorney fees.

9. Therefore, judgment shall be entered herein ordering the State of Arkansas to refund unto Plaintiff $152,149.22 in sales tax, $15,319.93 in penalties and $79,105.67 in interest, together with interest thereon as provided by law from the date of payment under protest, January 29, 1987, and $169,027.08 in sales tax, $16,902.73 in penalty and $43,025.53 in interest, together with interest thereon as provided by law from the date of payment under protest, February 5, 1988.

10. Judgment shall be entered herein also ordering the State of Arkansas to pay unto Plaintiff the reasonable amount of Plaintiff's attorney fees incurred in the prosecution of this matter, and this Court shall retain jurisdiction of this case for purposes of determining the amount of such fees, upon a proper showing by the Plaintiff.

Entered this 7th day of November, 1990.

/s/ Jack Ruple
Chancellor

APPROVED AS TO FORM:

/s/ Eugene G. Sayre
Eugene G. Sayre
JACK, LYONS & JONES, P.A.
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and

/s/ J. Edgerton Pierson, Jr.
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APPENDIX C

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May 4, 1992

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Re: 91-136 James C. Pledger v. Arkla, Inc.

Dear Gentlemen:

The Court made the following order in the above styled case today:

"Petition for Rehearing is denied.
Corbin, J., would grant."

Sincerely,

/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rm
cc: Cora L. Gentry
Alice Holcomb
(88-0282)

APPENDIX D

Arkansas Gross Receipts (Sales) Tax Act:

26-52-101. Title.

This act shall be known and cited as the "Arkansas Gross Receipts Act of 1941."

26-52-103. Definitions.

(a) The following words and phrases, except where the context clearly indicates a different meaning when used in this act, shall have the following meanings:

* * *

(3)(A) "Sale" is declared to mean the transfer of either the title or possession, except in the case of leases or rentals, for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which the transfer is accomplished.

(B) "Sale" is also declared to include the exchange, barter, lease, or rental of tangible personal property.

(C) In the case of leases or rentals of tangible personal property, the tax shall be paid on the basis of rental or lease payments made to the lessor of such tangible personal property during the term of the lease or rental; however, except for short term rentals and rentals of motor vehicles for less than thirty (30) days provided in § 26-52-310, the tax shall not apply to gross receipts or gross proceeds derived from leases or rentals of tangible personal property upon which either the Arkansas gross receipts tax or compensating tax was paid at the time of purchase of the tangible personal property.

(D) "Sale" shall include also the sale, giving away, exchanging, or other disposition of admissions, dues, or fees to clubs, to places of amusement, recreational or athletic events, or for the privilege of having access to or the use of amusement, athletic, or entertainment facilities.

(E) "Sale" shall not include the furnishing or rendering of services, except as otherwise provided in this section;

(4) "Gross receipts" or "gross proceeds" means the total amount of consideration for the sale of tangible personal property and such services as are herein specifically provided for, whether the consideration is in money or otherwise, without any deduction on account of the cost of the properties sold, labor service performed, interest paid, losses, or any expenses whatsoever. However, the term "gross receipts" or "gross proceeds" shall not include the manufacturer's federal excise taxes levied upon articles if the manufacturer's federal excise taxes are separately stated or separately billed. The term "gross proceeds" or "gross receipts" shall include the value of any goods, wares, merchandise, or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person;

* * *

(b) The definitions of words provided in this section are for the purposes of this act only.

* * *

26-52-301. Tax levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

(1) Tangible personal property;

(2) Natural or artificial gas, electricity, water, ice, steam, or any other utility or public service except transportation services, sewer services, and sanitation or garbage collection services;

* * *

26-52-401. Exemptions for various products and services.

There is specifically exempted from the tax imposed by this act the following:

* * *

(12)(A) Gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles purchased, whether within or without the state if the sales within the state are made to persons to whom sales tax permits have been issued as provided in § 26-52-202;

(B) Goods, wares, merchandise, and property sold for use in manufacturing, compounding, processing, assembling, or preparing for sale can be classified as having been sold for the purposes of resale or the subject matter of resale only in the event the goods, wares, merchandise, or property becomes a recognizable integral part of the manufactured, compounded, processed, assembled, or prepared products. The sales of goods, wares, merchandise, and property not conforming to this requirement are classified for the purpose of this act as being "for consumption or use".

* * *

(16) Gross receipts or gross proceeds derived from sales for resale which the state is prohibited by the Constitution and laws of the United States from taxing or further taxing, or which the state is prohibited by the Arkansas Constitution from taxing or further taxing;

* * *

Arkansas Compensating (Use) Tax Act:

26-53-101. Title.

The title of this subchapter shall be cited as the "Arkansas Compensating Tax Act of 1949."

26-53-102. Definitions.

As used in this subchapter, unless the context otherwise requires:

(1) "Sales price" means the consideration paid or given, or contracted to be paid or given, by the purchaser to the vendor for the article of the tangible personal property including any services that are a part of the sale valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the vendor without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expenses whatsoever; provided that cash discounts allowed and taken on sales shall not be included. "Sales price" shall not include the amount charged for property returned by customers upon rescission of the contract of sales when the entire amount charged therefor is refunded either in cash or credit, or the amount charged for labor or services rendered in installing or applying the property sold, the use, storage, or consumption of which is taxable under this subchapter. The term shall include, in addition to the consideration paid or given or contracted to be paid or given, the amount of any tariff or duty paid with respect to the importation of the article stored, used, or consumed in this state;

(2) "Storage" means and includes any keeping or retention in this state of tangible personal property purchased from a vendor for any purpose, except sale or subsequent use solely outside this state;

(3) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership or control of that property, except that it shall not include the sale of that property in the regular course of business;

* * *

(5) "Purchase" means the sale of tangible personal property by a vendor to a person for the purpose of storage, use, or consumption in this state. Furthermore, for purposes of this subchapter, the term "purchase" also includes any withdrawal of tangible person [sic] property from a stock or reserve maintained outside of the state by any person and subsequently brought into this state and thereafter stored, consumed, or used by that person or by any other person, and, in such event, the tax shall be computed on the value of the tangible personal property at the time it is brought into this state. No tax shall be computed to the extent that a withdrawal consists of carbonaceous materials such as petroleum coke or carbon anodes which are to be directly used or consumed in the electrolytic reduction process of producing tangible personal property for ultimate sale at retail.

(6)(A) "Sale" means any transfer, barter, or exchange of the title or ownership of tangible personal property, or the right to use, store or consume the same for a consideration paid or to be paid, in installments or otherwise, and includes any transaction whether called leases, rentals, bailments, loans, conditional sales, or otherwise, notwithstanding that the title or possession of said property, or both, is retained for security.

(B) For the purpose of this subchapter, the place of delivery of tangible personal property to the purchaser, user, storer, or consumer shall be deemed to be the place of sale, whether such delivery is made by the vendor or by common carriers, private contractors, mails, express, agents, salesmen, solicitors, hawkers, representatives, consignees, peddlers, canvassers, or otherwise;

* * *

(12) "In this state" or "in the state" or "within this state" means within the exterior limits of the State of Arkansas and includes all territory within those limits owned by or ceded to the United States of America.

* * *

26-53-106. Imposition and rate of tax generally -- Presumptions.

(a) There is levied and there shall be collected from every person in this state a tax or excise for the privilege of storing, using, distributing, or consuming within this state any article of tangible personal property purchases for storage, use, distribution, or consumption in this state at the rate of three percent (3%) of the sales price of the property.

(b) This tax will not apply with respect to the storage, use, distribution, or consumption of any article of tangible personal property purchased, produced, or manufactured outside this state until the transportation of the article has finally come to rest within this state or until the article has become commingled with the general mass of property of this state.

(c) This tax shall apply to use, storage, distribution, or consumption of every article of tangible personal property, except as provided in this subchapter, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are available for purchase within the State of Arkansas and irrespective of any other condition.

(d)(1) For the purpose of the proper administration of this subchapter and to prevent evasion of the tax and the duty to collect the tax imposed in this section, it shall be presumed that tangible personal property sold by any vendor for delivery in this state or transportation to this state is sold for storage, use, distribution, or consumption in this state unless the vendor selling the tangible personal property has taken from the purchaser a certificate signed by and bearing the name and

address of the purchaser to the effect that the property was purchased for resale.

(2) It is further presumed that tangible personal property shipped, mailed, expressed, transported, or brought to this state by the purchaser was purchased from a vendor for storage, use, distribution, or consumption in this state.

26-53-112. Exemptions generally.

There is specifically exempted from the taxes levied in this subchapter:

(1) Property, the storage, use, or consumption of which this state is prohibited from taxing under the Constitution or laws of the United States of America or of this state;

(2) Sales of tangible personal property on which the tax under the Arkansas Gross Receipts Act, § 26-52-101 et seq., is levied, and any tangible personal property specifically exempted from taxation by the Arkansas Gross Receipts Act, § 26-52-101 et seq., and legislation enacted subsequent thereto.

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92-218

In The
Supreme Court of the United States

OCTOBER TERM, 1992

ARKLA, INC., ...PETITIONER,

V.

JAMES C. PLEDGER, DIRECTOR, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS, ...RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

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92-218

In The
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ARKLA, INC., ... PETITIONER,

V.

JAMES C. PLEDGER, DIRECTOR,
DEPARTMENT OF FINANCE AND
ADMINISTRATION, STATE OF
ARKANSAS, ... RESPONDENT.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Respondent respectfully requests that this Court deny Petitioner's petition for writ of certiorari seeking review of the opinion of the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT CONFLICT WITH ANY DECISIONS OF THIS COURT

Arkla Inc., Petitioner, is a Delaware corporation which has its principal places of business in Little Rock, Arkansas and Shreveport, Louisiana. During the period of January 1, 1976 through February 28, 1987, Petitioner was engaged in the business of producing, buying, transporting and selling natural gas in Arkansas, Louisiana, Kansas, Oklahoma, and Texas. Petitioner bought gas and transported it through its interstate transmission pipelines. Located throughout Petitioner's interstate pipeline system were "pumping stations". Three of the pumping stations were located in Arkansas (Dunn, Beirne and Taylor Stations). The pumping stations housed several compressors which were used to compress the natural gas in the pipeline to expedite its transportation. The compressors as well as the compressor station heating systems were fueled by natural gas which was withdrawn from the Petitioner's pipeline. (R. 243).

The pumping stations received natural gas in unknown proportions from Arkansas and the Anadarko and Arkoma basins located principally in Texas and Oklahoma. (R. 298, 300-301) The natural gas which remained in the pipeline was transported further into Arkansas or on to Missouri, Louisiana or Texas. (R. 262-263 and 275).

The Respondent assessed the Petitioner Arkansas gross receipts (sales) tax on the value of the natural gas which was withdrawn from the pipeline to fuel the pumping stations. The Petitioner asserted that the Respondent's assessment was barred by the Commerce Clause. The Arkansas Supreme Court upheld the tax assessment.

The sale of natural gas is a taxable transaction in the State of Arkansas. Ark. Code Ann. §26-52-301. A sale is defined as the transfer of either title or possession of tangible personal property. The sales tax applies to the gross receipts or gross proceeds of the sale. Gross receipts or gross proceeds means the total amount of consideration for the sale including the value of any goods, wares, merchandise or property withdrawn or used from the established business or from the stock in trade of the established reserves for consumption or use in such business or by any other person. Ark. Code Ann. §26-52-103.

The Arkansas Supreme Court properly held that the State sales tax did not violate the Commerce Clause and applied the test outlined in *Complete Auto Transit v. Brady*, 430 U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). The Arkansas Supreme Court followed previous Arkansas court decisions which found this type of transaction to be taxable. *Georgia Pacific Corp. v. Larey*, 242 Ark. 428, 413 S.W.2d 868 (1967); *Department of Public Utilities v. Arkansas Louisiana Gas Company*, 194 Ark. 354, 108 S.W.2d 586 *affirmed Arkansas Louisiana Gas Company v. Department of Public Utilities*, 304 U.S. 61, 58 S.Ct. 770, 83 L.Ed. 1149

(1937); *Southern Kraft Corporation v. Hardin*, 205 Ark. 512, 169 S.W.2d 637 (1943); *Arkansas Louisiana Gas Company v. Hardin*, 206 Ark. 593, 176 S.W.2d 903 (1944).

A. Conflicts Among the Supreme Courts of Several States.

The Petitioner claims that there is conflict among the states as to the taxation of this transaction. There is no conflict. Petitioner has cited *Midwestern Gas Transmission Co. v. Wisconsin Dept. of Rev.*, 84 Wis.2d 261, 267 N.W.2d 253 (1978) to support its statement. *Midwestern* is a Wisconsin use tax case which held that natural gas that was used in Wisconsin to fuel compressor stations had never come to rest in the state and therefore was not taxable under the Wisconsin use tax statute. The Wisconsin Court found that none of the gas had been produced in Wisconsin and that in order to sustain a use tax assessment, the item taxed must "come to rest" in the state. The facts presented by Petitioner differ in such a substantial manner so as to resolve conflict which may be seen to arise from the Wisconsin Court's decision in *Midwestern*. First, the gas in the Wisconsin case was produced outside the taxing state and, for the most part, would be shipped to points outside Wisconsin. In the present case, a portion of the gas which was being shipped by Petitioner had been produced in Arkansas and would be consumed Arkansas. Petitioner is unable to establish the amount of natural gas which is produced outside of Arkansas to draw itself closer to the facts in the *Midwestern* case. The Petitioner's constitutional question, without specific evidence of interstate commerce, would amount

to nothing more than giving an advisory opinion on an abstract, hypothetical legal question.

Assuming *arguendo* that all facts relating to gas production and use were identical and the tax statutes in the present case and the *Midwestern* case were similar (i.e. both use tax or both sales tax) Petitioner's argument that this Court should follow the *Midwestern* case is not controlling because of the Petitioner's substantial nexus with the State of Arkansas. The taxpayer in *Midwestern* did not have the ties to Wisconsin to allow the imposition of the tax as does Arkla. Therefore, the *Midwestern* case can be distinguished upon its facts.

In a later Wisconsin case, *Wisconsin Tel. Co. v. Wisconsin Dept. of Rev.*, 125 Wis. 339, 371 N.W.2d 825 (1985), under the Wisconsin sales tax law, the Wisconsin court implied that it would have upheld a sales tax assessment upon the use of natural gas. In this case, the Wisconsin Supreme Court upheld a sales tax assessment on telephone calls which originated in Wisconsin and were billed to Wisconsin telephones. The court applied the *Complete Auto Transit v. Brady* standard and stated that the tax did not burden interstate commerce because there was no double taxation and that interstate and intrastate commerce were placed on equal footing. The court distinguished the *Midwestern* case and ruled consistently with the Arkansas Supreme Court, thereby resolving any conflict between the Arkansas and Wisconsin courts which may have seemed to exist.

The most recent cases involving the issue of taxation of compressor fuel are from the states of Mississippi[1] and Utah[2]. In both states, a combined sales and use tax was assessed on the consumption of compressor fuel withdrawn from an interstate natural gas pipeline. In both cases the courts applied the test of internal and external consistency. The tax was found to be internally consistent because every state could impose an identical tax and no multiple taxation would result. External consistency was met because the state had taxed only that portion of the revenues from the interstate activity which reasonably reflected the in-state component of the activity being taxed. Therefore, the Petitioner's argument that there is conflict among the State court decisions on this issue is incorrect. Each state court applied the proper standard of review, thereby negating the appearance of conflict.

The Supreme Court of North Dakota has also been consistent with the Arkansas Supreme Court on the issue of taxation of the fuel withdrawn from a pipeline system and consumed by the processing facilities. In *Rocky Mountain Oil & Gas Ass'n. v. Conrad*, 405 N.W.2d 279 (N.D. 1987), the North Dakota Supreme Court found that these transactions were taxable and that the burden upon interstate commerce was unsubstantiated.

Petitioner also asserts there is conflict in decisions

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[1]*Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992)

[2]*Questar Pipeline Co. v. Utah State Tax Commission*, 817 P.2d 316 (Utah 1991)

between the Supreme Courts of Tennessee and Arkansas. In the Tennessee case of *Texas Gas Transmission Corp. v. Benson*, 444 S.W. 2d 137 (Tenn. 1969) on very similar facts, the Tennessee Supreme Court struck down a use tax assessment upon natural gas consumption stating that the fuel "never came to rest" within the state before it was consumed. Therefore, no "taxable moment" existed under the Tennessee use tax statute. The Tennessee court relied upon *Helson v. Commonwealth*, 279 U.S. 245, 73 L.Ed. 683, 49 S.Ct. 279 (1929) and broadly construed the ban on taxation of interstate commerce to include any necessary and integral part of the interstate operation.

The decision of the Tennessee Supreme Court and the Arkansas Supreme Court do appear to conflict as to the standard to be applied in the taxation of compressor fuel. However, *Texas Gas Transmission* was decided in 1969 and based upon the standard of review of *Helson*, the *Complete Auto Transit* decision rendered by this Court in 1977 changed the perspective from which this Court views taxing statutes.

Looking beyond the formal language of the tax statute to its practical effect and applying the test outlined in *Complete Auto Transit*, does the tax assessed in either the Tennessee case or the present case violate the Commerce Clause? The answer is no. There is no threat of double taxation. The fuel is consumed and will never be taxed again. The Petitioner is unable to show that the natural gas withdrawn from the pipeline was previously subject to tax in another state. Where is the burden upon the interstate operation? The Petitioner is unable to establish the percentage of

natural gas which is produced within and without Arkansas and the percentage of the gas which will eventually be used in Arkansas or shipped to another state. Therefore, a portion of the gas which is withdrawn from the pipeline and consumed is intrastate gas. Petitioner is unable to show that the burden of taxation was borne by interstate gas to a greater extent than the intrastate gas. The tax is borne equally by the intrastate and interstate gas with the interstate gas not being subjected to multiple or double taxation.

In summary, the cases from Tennessee and Wisconsin can be distinguished from this case and present no real harm from minor conflict. If this Court chooses to reverse the Arkansas Supreme Court in this matter, a quagmire would result. The expectations and assessments of North Dakota, Wisconsin, Mississippi, Utah and Arkansas would be left undecided and in turmoil. Therefore, Respondent states that the decisions of the Arkansas Supreme Court do not significantly conflict with decisions of other state Courts. Therefore, the Petition for Writ of Certiorari should be denied.

B. Conflicts among the U. S. Supreme Court decisions and the decision of the Arkansas Supreme Court.

The Petitioner attempts to create an inconsistency between several U.S. Supreme Court cases and the decision of the Arkansas Supreme Court. Examining each case individually, there is no conflict with the decision of the Arkansas Supreme Court.

First, the Petitioner points to the case of *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 88 L.Ed. 1304, 64 S.Ct. 1023 (1944) to support its proposition that neither a sales nor a use tax can be assessed upon the use of this fuel. The Respondent does not disagree that the State of Arkansas may not assess a sales tax upon interstate sales which both originated and are completed in another state, but those are not the facts before this Court. A portion of the gas consumed as fuel by the Arkansas compressors was produced in Arkansas. Therefore, the "sale", as defined by Arkansas law, occurred in Arkansas and the authority to assess sales tax arose. *Department of Public Utilities v. Arkansas Louisiana Gas Company*, 194 Ark. 354, 108 S.W.2d 586 *affirmed Arkansas Louisiana Gas Company v. Department of Public Utilities*, 304 U.S. 61, 58 S.Ct. 770, 83 L.Ed. 1149 (1937); *Southern Kraft Corporation v. Hardin*, 205 Ark. 512, 169 S.W.2d 637 (1943); *Arkansas Louisiana Gas Company v. Hardin*, 206 Ark. 593, 176 S.W.2d 903 (1944).

Petitioner also cites *Helson & Randolph v. Kentucky*, 279 U.S. 245, 73 L.Ed. 783, 49 S.Ct. 279 (1929) as controlling authority of the U. S. Supreme Court which conflicts with the decision of the Arkansas Supreme Court. In *Helson* a use tax upon gasoline used to power a ferry was struck down. The Court held that the tax is exacted as the price of the privilege of using an instrumentality of interstate commerce. Disregarding the sales/use tax distinction and comparing the ferry boat to the compressor, there appears to be conflict between the decisions. The *Helson* decision was rendered in 1929 and this Court, in its recent decisions, has taken a practical and more realistic approach to

whether a tax is a burden on interstate commerce. The standard of review has moved from the broad and superficial examination applied in *Helson* which looked to whether the tax applied to anything which moved in interstate commerce to the indepth and realistic approach applied in *Complete Auto Transit* which looks to whether there is double taxation of interstate commerce and whether the tax is related to benefits received by the taxpayer. *D.H. Holmes v. McNamara*, 486 U.S. 24 (1988); *Quill Corporation v. North Dakota*, 119 L.Ed.2d 91, 112 S.Ct. 1904 (1992).

Therefore, while the *Helson* case has not been specifically overruled, the law announced therein has ceased to be viable in the ever changing area of interstate commerce.

II.

THE DECISION OF THE ARKANSAS SUPREME COURT DOES NOT BURDEN INTERSTATE COMMERCE

The facts of this case do not present the issues raised by Petitioner. Petitioner argues that the sales tax assessed by Respondent is a direct tax upon a commodity in interstate commerce. The theory behind the tax restriction on interstate commerce is to prohibit double taxation and to allow goods to flow freely between the states. The tax levied herein does not violate either of these principals. The tax imposed upon the pipeline company is not a direct tax and does not violate the Commerce Clause. The activity taxed, the consumption of natural gas in compressor stations located in Arkansas, has a sufficient nexus with the State to justify the tax. The tax is fairly apportioned to assess only local activities and does not discriminate against interstate commerce by subjecting interstate taxpayers to a double taxation where similarly situated intrastate taxpayers would only be subject to single taxation. Finally, the tax is fairly related to the benefits provided by the State to the pipeline company. *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274. 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977). The Petitioner has not presented facts which establish double taxation or a burden on interstate commerce.

CONCLUSION

For the reasons stated above, this Court should deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 92-218

In the Supreme Court of the United States

OCTOBER TERM, 1992

ARKLA, INC.,
PETITIONER
v.
JAMES C. PLEDGER, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS,
RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioner Arkla, Inc. is a corporation organized under the laws of the State of Delaware with its headquarters and commercial domicile at Little Rock, Arkansas and Shreveport, Louisiana. This corporation has only wholly owned subsidiaries. Arkla, Inc. is a publicly traded corporation listed on the New York Stock Exchange.

Respondent James C. Pledger is the duly appointed and currently serving Director of the Arkansas Department of Finance and Administration. He is the person who is charged by statute with administering the state and local Compensating (Use) Taxes and Gross Receipts (Sales) Taxes imposed in Arkansas.

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

I. OVERVIEW OF BRIEF IN OPPOSITION

In its Petition for a Writ of Certiorari, Petitioner stated a rather succinct three-fold argument why this Petition for a Writ of Certiorari should be granted:

(1) There is a clear conflict between the decision of the Arkansas Supreme Court in this proceeding and this Court's decision in *Helson & Randolph v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S. Ct. 279 (1929).

(2) There is a clear conflict among the final decisions of the Supreme Courts of Tennessee and Wisconsin vis-a-vis those decisions of the Supreme Courts of Utah, Arkansas and Mississippi; and

(3) The decision below is clearly contrary to the rule set forth in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 88 L.Ed. 1304, 64 S.Ct. 1023 (1944).

Respondent, in his Brief in Opposition to the Petition, actually acknowledges that he agrees with those three assertions. Respondent in his brief acknowledged that:

As to contention (1) above, Arkla is correct; there is a conflict between the decision of the Arkansas Supreme Court and *Helson*. In his brief Respondent stated "[d]isregarding the sales/use tax distinction and comparing the ferry boat to the compressor, **there appears to be conflict between the decisions.**" (Respondent's Brief In Opposition, p. 9.)

As to contention (2) above, Arkla is correct; while he alleges the *Midwestern Gas*[1] decision can be distinguished on

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[1] *Midwestern Gas Transmission Corp. v. Wisconsin Department of Revenue*, 267 N.W.2d 253 (Wis. 1978), *cert. denied*, 439 U.S. 997, 58 L.Ed.2d 670 (1978).

its facts, Respondent stated "[t]he decision of the Tennessee Supreme Court and the Arkansas Supreme Court **do appear to conflict as to the standard to be applied in the taxation of compressor fuel.**" (Respondent's Brief, p. 7.)

As to contention (3) above, Arkla is correct; the Respondent stated that he "**does not disagree that the State of Arkansas may not assess a sales tax upon interstate sales which both originated and are completed in another state**" (Respondent's Brief, p. 9), but he suggests that "those are not the facts before this Court." (Respondent's Brief, p. 9.)

Thus, the major premises upon which Arkla suggests this Court should grant the writ applied for are each agreed to by the Respondent. He acknowledges that there is a conflict between the *Helson* decision and the Arkansas Supreme Court decision, he acknowledges that there is a conflict at least between the Arkansas Supreme Court decision and the Tennessee Supreme Court decision, and he acknowledges that Arkansas may not assess a sales tax upon a transaction which originated and was completed in another state. However, while the Respondent acknowledges the conflicts between the instant decision and the *Helson* and *Texas Gas* cases, he suggests that this Court adopt a "no harm, no foul" standard for resolving conflicting decisions when he suggests that these cases "present no real harm from minor conflict." (Respondent's Brief, p. 8.) Direct, irreconcilable conflicts of decisions that affect numerous state taxing agencies and all operators of interstate pipelines are the type of conflicts which only this Court can and should resolve!

II. CONFLICTS WITH OTHER STATE COURT DECISIONS

In Section I, Part A of the Petition (pp. 9–11), the Petitioner noted the clearly irreconcilable conflict between two sets of decisions, namely the decisions in *Texas Gas Transmission Corp. v. Benson*, 444 S.W.2d 137 (Tenn. 1969), *Midwestern Gas Transmission Co. v. Wisconsin Department of Revenue*, *supra*, ftnt. 1, and *Michigan Wisconsin Pipe Line Co. v. State*, 227 N.W.2d 334

(Mich. App., Div. 2, 1975), and those of the instant case, *Tennessee Gas Pipeline Co. v. Marx*, 594 So.2d 615 (Miss. 1992), and *Questar Pipeline Company v. Utah State Tax Commission*, 817 P.2d 315 (Utah 1991).

In response to that contention, the Respondent acknowledges that *Texas Gas* conflicts with the decision at issue, but argues that *Midwestern Gas* is factually distinguishable (p. 4 of its Brief in Opposition), that *Midwestern Gas* was a "nexus" decision (p. 5) and that a later decision, while not overruling it, "implied" that it would no longer be followed (p. 5). While all cases are somewhat factually different, the dissenting opinion in the case at bar itself noted that *Midwestern Gas* is "a case that presented a factual situation similar to the one here." (Petition, Appendix A, p. 8a.) The Department only specifies those factual differences as (i) *Midwestern Gas* is a use tax case, not a sales tax case (p. 4), (ii) none of the gas in Midwestern's lines had been produced in Wisconsin (p. 4), and (iii) Arkla has a greater nexus with Arkansas than Midwestern Gas had with Wisconsin (p. 5).

As Petitioner set forth in Section II of the Petition (pp. 21–27), the "only excise tax which the State of Arkansas could have possibly imposed upon the consumption of a part of the natural gas in question ... would have been its **use** tax . . .." (Petition, p. 26.) However, the Commerce Clause limitations upon the imposition of either a **sales** tax or a **use** tax on the value of the compressor fuel would have been precisely the same. As is noted in Section I of the Petition, if under *Helson* a **use** tax could not have been imposed upon the value of the fuel consumed to operate the ferry because it was an imposition of a direct tax upon an instrumentally of interstate commerce moving goods in interstate commerce, a **sales** tax upon the withdrawal of that very same fuel (as Arkansas suggests it can create) would have fallen for precisely the same reasons. Thus, the fact that the tax in *Midwestern Gas* was a **use** tax rather than a **sales** tax, is a difference without a distinction.

The Department next contends that the fact that in *Midwestern Gas* none of the gas was produced in Wisconsin should be a material factual distinction. While the Department suggests that

Petitioner is unable to establish the amount of natural gas produced outside of Arkansas, the record actually reflects that less than 10% [2] of the gas passing through the Dunn Compressor Station was produced in Arkansas. That record also clearly reflects that the natural gas within the interstate pipeline system is gas in interstate commerce, irrespective of where it is produced and purchased. All natural gas consumed as compressor fuel and at issue in these proceedings, whether that gas was produced in Texas, Oklahoma, Kansas, Louisiana or in Arkansas, was, at that moment, within the interstate natural gas pipeline system such that it was, legally, **interstate** natural gas subject to the exclusive jurisdiction of the FERC.[3] Thus, this is a minor factual difference, with absolutely no legal distinction. Gas in interstate commerce is interstate commerce irrespective of where such natural gas is produced or purchased.

The Department lastly suggests, as a factual difference, that Arkla has a substantial nexus with Arkansas, but Midwestern did not with Wisconsin. While this may be a relevant factual difference if Arkla were contending that there is insufficient nexus between Arkla and the State of Arkansas for the tax to be imposed, that is not the principle issue of the Petition filed herein. Thus, that factual distinction is also irrelevant to the suggestion that a writ should not be granted herein.

Respondent also suggests that in *Wisconsin Telephone Co.*

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[2] It was indicated that the percentage of Arkansas production passing through the Dunn Compressor Station was "somewhere in the neighborhood of 10 percent" (Tr. p. 248). The record further reflects that for the year 1978, 9.37% of the gas passing through the Dunn Compressor Station was produced in Arkansas, thus 90.63% was produced outside the state (Tr. p. 280).

[3] Mr. John Shafer clearly testified (Tr. p. 253–54) with respect thereto, and such issue has been addressed by this Court and other courts in the United Gas and related cases; *see* FPC Order No. 610, 447 Federal Power Commission Reports 245 (February 9, 1972), *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 32 L.Ed.2d 369, 92 S.Ct. 1827 (1972), *Louisiana Power & Light v. FPC*, 483 F.2d 623 (5th Cir. 1973), *cert. denied*, 416 U.S. 974 (1974).

v. Wisconsin Department of Revenue, 371 N.W. 2d 825 (Wis. 1985), "the Wisconsin [Supreme] court implied that it would have upheld a **sales** tax assessment upon the **use** of natural gas" (Respondent's Brief, p. 5, emphasis supplied), in effect overruling *Midwestern Gas*. That characterization of *Wisconsin Telephone*, however, is a significant misstatement of the holding of that case. The Wisconsin Supreme Court clearly distinguished *Midwestern Gas* from the telephone situation on a factual basis, finding, as its foundation for rejecting the argument that *Midwestern Gas* was on point, that unlike *Midwestern Gas*:

> The [sales] tax is not imposed on interstate activity midstream, but on the sale at the call's origin, an activity which occurs in Wisconsin. The sellers and buyers of the telephone services are located in Wisconsin. The placing of the telephone call and subsequent billing occur in Wisconsin. 371 N.W. 2d 825, 829.

There are no other references, direct or indirect, in *Wisconsin Telephone* to the *Midwestern Gas* decision other than those which lead to this specific, distinguishing holding. Thus, every indication in *Wisconsin Telephone* is that *Midwestern Gas* is, and remains, the controlling precedent in that state with respect to the imposition of a use tax upon the value of compressor fuel such as that at issue herein.

Thereafter (at page 6) the Respondent seems to suggest that Petitioner asserts that there is a conflict among the decisions of the Supreme Courts of Arkansas, Mississippi and Utah. However, Petitioner does not make that contention. The decisions of the Wisconsin and Tennessee Supreme Courts and the Michigan Court of Appeals are all basically in alignment. The decisions of the Supreme Courts of Arkansas, Mississippi and Utah are likewise basically in alignment as to their results -- each of those cases applied the *Complete Auto Transit* test, and **only** that test, and none ever mentioned the *Helson* decision. The conflict addressed by Petitioner is between these two sets of decisions, not within either set. Thus, Respondent's statement that "the Petitioner's

argument that there is a conflict among the State court decisions on this issue is incorrect," is itself manifestly erroneous, and results from the Respondent's failure to properly comprehend the argument advanced. The Respondent clearly acknowledges that there is a conflict between the instant decision and that in *Texas Gas*.

Respondent also suggests that the decision in *Rocky Mountain Oil & Gas Assn. v. Conrad*, 405 N.W. 2d 279 (N.D. 1987), held that "the burden on interstate commerce was unsubstantiated." (Respondent's Brief, p. 6). *Rocky Mountain* involved fuel for a processing plant located near the production field which may or may not have been in the stream of interstate commerce. However, after noting that the stipulation of facts failed to disclose any foundation of interstate commerce, the North Dakota Supreme Court specifically held "we decline to decide the constitutional issue." 405 N.W. 2d 279, 284. It did not find that "the burden upon interstate commerce was unsubstantiated" (Respondent's Brief, p. 6), as Respondent suggests; it stated "we **decline** to decide the constitutional issue." (Emphasis supplied.) 405 N.W. 2d 279, 284. Thus, that decision is totally irrelevant to the resolution of this case.

III. *HELSON* IS THE CONTROLLING AUTHORITY

One of the principle arguments advanced by Petitioner is that *Helson* is, and remains, the controlling authority of this case (Petition, pp. 11–20) and that decision, *Helson*, was not even mentioned in the majority opinion, nor in the decisions of the Supreme Courts of Mississippi and Utah. The Respondent's response to that contention is almost as brief as that of the majority opinion itself, presenting a one paragraph response which acknowledges that "there appears to be conflict between the decisions." (Respondent's Brief, p. 9.) It suggests, however, that *Helson* has died a natural death, being decided in 1929, and the Court having recently "taken a practical and more realistic approach to whether a tax is a burden on interstate commerce." (Respondent's Brief, p. 9–10.) However, as Petitioner has noted, *Helson* has never been overruled and did not die any natural death. Only four years before the decision in *Complete Auto Transit, Inc. v. Brady*, 430

U.S. 274, 51 L.Ed.2d 326, 97 S.Ct. 1076 (1977), in *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 35 L.Ed.2d 545, 93 S.Ct. 1186 (1973), this Court affirmed that the line drawn by *Helson* continued to serve a rational purpose. It specifically retained, rather than overruled (or let die a "natural" death), the bright-line rule founded in the *Helson* decision.

Further, even after *Complete Auto Transit*, this Court has specifically retained that distinction. In *Commonwealth Edison Company v. Montana*, 453 U.S. 609, 69 L.Ed.2d 884, 101 S.Ct. 2946 (1981), this Court was afforded the clear opportunity to overrule *Helson*, if that were necessary or appropriate. Therein, this Court specifically noted that while to the extent *Helson* suggested a state tax or regulation was immune from Commerce Clause scrutiny because it attached only to a local or intrastate activity had been rejected, the Court stopped far short of overruling that decision. It specifically noted that *Heisler v. Thomas Colliery Co.*, 279 U.S. 245, 67 L. Ed. 237, 43 S. Ct. 83 (1922) and its progeny, which includes *Helson*, were not wrongly decided. Thus, for the reasons more fully set forth in the Petition (p. 11-21), *Helson* is the controlling precedent for resolution of this case. It has never been overruled and its bright-line rule -- no state may impose a direct tax upon fuel consumed within a state to power an instrumentality of interstate commerce -- continues to provide a viable line of demarcation of a realm of commercial activity that is free from interstate taxation.

IV. DOUBLE TAXATION

Throughout his Brief, the Respondent asserts that the principle (or possibly the only) purpose of the Commerce Clause is to ensure the avoidance of double taxation. On the contrary, the principle purpose of the Commerce Clause was to provide the Congress with exclusive control of such commerce, and the application of the Commerce Clause in the area of state taxation has been to prohibit the imposition of state tariffs which impair the free flow of commerce between the states. While the purpose of the Commerce Clause as it relates to the imposition of state taxes is much too broad an issue to address in this Reply Brief, avoiding

double taxation is only one of many purposes of the Commerce Clause.

Irrespective of the underlying purpose of the Commerce Clause, the statement by the Court below and repeated by Respondent in his Brief, that double taxation cannot occur in the case at issue because the compressor fuel is consumed, is clearly erroneous. The Arkansas Supreme Court rather offhandedly observed, in finding that the "fairly apportioned" standard of *Complete Auto Transit* had been satisfied, that "only that gas consumed in the state [of Arkansas] is subject to the tax, and no other state will tax the withdrawn gas once it is consumed." (Petition, Appendix A, p. 6a.) That rationale, however, is fallacious. The State of Oklahoma could very well conclude that the appropriate method of apportionment is, as is customary in the apportionment of most transportation company type taxes, to be based upon the miles of interstate pipeline located within the State of Oklahoma as compared to the total number of miles of the Company's interstate pipelines located in all states. If such were the case, with Arkansas having taxed 100% of the gas consumed in Arkansas, the proportion of the gas consumed in Arkansas which is thus allocated to the interstate pipelines located within the State of Oklahoma would be taxed twice. While Arkansas' method of taxation, **if adopted by all of the states**, would avoid the double taxation, it does not fairly apportion the tax on gas consumed to the respective states which benefit from the interstate transportation of that gas.

Arkansas does not attempt to impose a sales tax upon only the gas purchased and consumed in Arkansas (less than 10%) which could possibly afford a proper apportionment of that tax, it attempts to tax 100% of the gas consumed within the State without any apportionment to the other states in which the gas was produced or purchased. Thus, the tax at issue is, as Petitioner notes in its Petition, an **unapportioned** direct tax on the value of the gas consumed as compressor fuel.

V. THE *COMPLETE AUTO TRANSIT* TESTS ARE NOT SATISFIED

Respondent also suggests (p. 11) in a totally conclusionary fashion with no factual foundation whatsoever, that each of the tests of *Complete Auto Transit* are satisfied. However, such is not the case and this Court may find this case beneficial, not only in reaffirming the bright-line rule of *Helson*, but also in addressing points not properly addressed or considered by the Arkansas Supreme Court when it erroneously applied the *Complete Auto Transit* tests.

While this Reply Brief is not the proper forum for Petitioner's argument, upon granting of this writ, Petitioner will show that even if the *Complete Auto Transit* test is the proper test to be applied in this case, the Arkansas Supreme Court did not appropriately evaluate those tests. It clearly did not correctly evaluate the nexus and apportionment considerations, and definitely failed to properly consider the relevant factors under the "reasonably related to the services provided" test. Contrary to the conclusionary statements in both the majority opinion and Respondent's brief, this case does not satisfy the *Complete Auto Transit* tests.

VI. THE DECISION VIOLATES THE RULE OF *DILWORTH*.

Respondent acknowledges that Arkansas may not impose a sales tax upon a transaction which originated and was completed in another state. However, he suggests that these are not the facts presented here because a portion of the gas "used" (upon which a "**sales**" tax, not a "**use**" tax was levied) as compressor fuel was produced in Arkansas, therefore alleging that a "sale" occurred in Arkansas. Again, even if there were a "sale", a transfer of title or possession, [4] within Arkansas of the gas withdrawn and consumed, only that portion produced and consumed in Arkansas could ever be deemed to be an Arkansas "sale," subject to an Arkansas sales

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[4] *See*, Ark. Code Ann. §26-52-103(a)(3)(A), Petition, Appendix D, p. 27a.

tax. Here, however, Arkansas has levied an **unapportioned** sales tax upon **all** of the gas consumed within the borders of Arkansas irrespective of where the "sale" (the transfer of title or possession) occurred. The evidentiary record reflects that more than 90% of the gas in question was "sold" to Arkla outside of Arkansas' borders. Therefore, for the reasons set forth in Section II of the Petition (pp. 21–27), Arkla submits that the Respondent and the Arkansas Supreme Court have unquestionably overstepped the limitations on state taxation set by the Commerce Clause as interpreted by this Court in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 377, 88 L. Ed. 1304, 64 S. Ct. 1023 (1944).

VII. CONCLUSION.

Respondent's opposition to the Petition filed herein actually supports, rather than opposes the application. There are conflicts, clearly irreconcilable conflicts, between the decisions of the Supreme Courts of Wisconsin and Tennessee and the decisions of the Arkansas, Mississippi and Utah Supreme Courts, and between this Court's decisions in *Helson* and *Dilworth* and the decision appealed here. The Respondent, while attempting to show insignificant factual differences in the cases, acknowledges that such conflicts do exist. Therefore, for the reasons set forth in the Petition, a Writ of Certiorari to the Arkansas Supreme Court should be issued, this case heard by this Court and the decision of the Arkansas Supreme Court reversed.

Respectfully submitted,

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